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Third report on State responsibility

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I. Introduction[1]

A. Programme for completion of the second reading

1. At its fifty-first session in 1999, the Commission completed the review of Part One of the draft articles on second reading, which it began in 1998. Articles 1 to 35 have been considered by the Drafting Committee and reported to the plenary.[2] Since their consideration, some further comments have been forthcoming from Governments within the framework of the debates in the Sixth Committee.[3] There have also been relevant developments in the jurisprudence.[4] As a matter of impression, it may be said that the changes provisionally made to Part One in 1998 and 1999 have on the whole been welcomed as a simplification and clarification of the original intent of that Part. The underlying conception of Part One (setting out the framework of general secondary rules of international law for determining whether a State has committed an internationally wrongful act) has remained essentially unchallenged, and each of the existing chapters of Part One has been retained.

2. The Commission itself has reserved for further consideration a number of issues in relation to Part One. They are:

(a) The need for a provision dealing with State responsibility for breach of obligations owed to the international community as a whole (obligations *erga omnes*) and its relation to the provisions of article 19 as adopted on first reading;[5]

(b) The formulation and location of former article 22 (Exhaustion of local remedies);[6]

(c) The formulation of article 30 (Countermeasures in respect of an internationally wrongful act), in the light of the treatment of countermeasures elsewhere in the draft;[7]

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[1] The Special Rapporteur wishes to thank M. Pierre Bodeau, Research Fellow at the Research Centre for International Law, for significant assistance with this report, and the Leverhulme Trust for its generous financial support.

[2] For the text of the draft articles provisionally adopted by the Drafting Committee, see A/CN.4/L.569, and Corr.1 (Part One, Chapters I and II); and A/CN.4/L.574, and Corr.1-4 (Part One, Chapters III to V). See also the reports of the Chairman of the Drafting Committee in 1998 (Mr. Simma, Doc. A/CN.4/SR.2562) and in 1999 (Mr. Candioti, Docs. A/CN.4/SR.2605 and A/CN.4/SR.2606).

[3] See the topical summary of the discussion held in the Sixth Committee during its 53rd session (A/CN.4/496) and during its 54th session (A/CN.4/504), prepared by the Secretariat.

[4] For example, the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case *Prosecutor v. Tadic*, Case No. IT-94-1-A, 15 July 1999.

[5] See *ILC Report ... 1998*, p. 147 (para. 331) (GAOR, 53rd session, Suppl. No. 10, A/53/10). Associated with this question are doubts expressed by some as to the need for proposed article 29 *bis* (Compliance with peremptory norms): see *ILC Report ... 1999*, pp. 165-166 (paras. 309-315) (GAOR, 54th session, Suppl. No. 10, A/54/10).

[6] *Report ... 1999*, pp. 141-145 (paras. 223-243).

[7] Ibid., p. 198 (para. 448).

(d) The possible insertion of a further circumstance precluding wrongfulness, viz., the exception of non-performance (*exceptio inadimpleti contractus*), as proposed by the Special Rapporteur in 1999.[8]

3. It should be noted that each of these issues is implicated with the treatment of the provisions of existing Part Two.[9] Moreover, if the Commission is to complete its second reading of the draft articles by 2001, as scheduled and as demanded by the General Assembly, it is essential that a complete text of the draft articles as a whole be presented to the Sixth Committee this year. This should enable the Commission to review the draft articles as a whole in the light of any further comments received before its next session.

4. Accordingly it is proposed in the present report to make recommendations on the whole of Part Two as adopted on first reading, and in the process to consider the four issues enumerated in paragraph 2 above. On that basis the Special Rapporteur would hope to present in 2001 a complete text of the draft articles with commentaries for consideration and adoption by the Commission at its fifty-third session.

B. Parts Two and Three as adopted on first reading: general considerations

5. As adopted on first reading, Part Two deals with a wide range of issues:

(a) A statement of general principles, of which the most important is a "definition" of the term "injured State" (chap. I, articles 36-40);

(b) A chapter, lengthily entitled "Rights of the injured State and obligations of the State which has committed an internationally wrongful act", which sets out basic principles of cessation and reparation as well as the specific content of reparation (chap. II, articles 41-46);

(c) A chapter dealing with countermeasures (chap. III, articles 47-50);

(d) A chapter dealing briefly with the consequences of international crimes as defined in article 19 (chap. IV, articles 51-53).

6. So far as concerns the settlement of disputes in Part Three, the retention of that Part depends on a decision as to the form of the draft articles. The Special

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[8] Ibid., pp. 171-175 (paras. 334-347). For the proposition made by the Special Rapporteur, see *Second Report...*, A/CN./498/Add.2, pp. 41-49 (paras. 314-329).

[9] Thus, to take each of the four issues identified in paragraph 2, these relate to issues in present Part Two in the following ways:

(a) There is a clear relation between articles 19, 40 and 51 to 53, whereas considered in isolation article 19 is a category without consequences;

(b) It has been suggested that article 22 is better placed in a section on the invocation of responsibility rather than in Part One;

(c) To the extent that the regime of countermeasures is not covered elsewhere in the draft articles, there is a strong case for greater elaboration of article 30 itself, whereas if the subject is dealt with in Part Two, a simple formulation of article 30 in the nature of a cross-reference should be sufficient;

(d) One view is that the *exceptio inadimpleti contractus* is either coextensive with, or would be adequately covered by, the regime of countermeasures, and the Commission has deferred consideration of it in that context.

Rapporteur has already given his reasons for rejecting the special linkage adopted on first reading between compulsory dispute settlement and the taking of countermeasures.[10] Those reasons were endorsed by many members of the Commission during the debate on the Second Report.[11] Thus it is possible, and in the Special Rapporteur's view desirable, to focus on the substance of the law of State responsibility, including its implementation, before considering the related questions of the form of the draft articles and the settlement of disputes.

7. In considering issues arising in Part Two, certain initial points should be made:

(1) **Internal application of the draft articles**. The obligations associated with cessation, reparation and countermeasures in Part Two are themselves international obligations of the State concerned, and the draft articles, which apply to all international obligations of States, are thus reflexive. In consequence article 4, which provides that a State may not invoke its internal law as an excuse for failure to comply with its international obligations, applies to the international obligations in Part Two. The same holds true for circumstances precluding wrongfulness: thus, a State should be entitled to rely, for example, on *force majeure* as a circumstance precluding the wrongfulness of the non-payment of compensation, to the extent allowed by chapter V of Part One. This reflexive quality of Part One was perhaps not always clearly realized during the drafting of Part Two. For example, the substance of article 4 is repeated in article 42 (4), a repetition which is not strictly necessary and may have undesirable *a contrario* implications elsewhere in Part Two.[12]

(2) **Part Two and the substance/procedure distinction**. The draft articles, although they cover a field which might be described as "judicial remedies",[13] are generally formulated in terms of rights and obligations of States. In many national legal systems, equivalent provisions would more naturally be expressed in terms of the powers of the court with respect to remedies. This approach is not possible in a system where there is no a priori right to a court, and where a wide variety of courts, tribunals and other bodies may be faced with issues of responsibility. Despite these differences, the language of national law (the so-called "private law analogy") quite often creeps into international judicial decisions.[14] Although the draft articles are not concerned with such issues as the jurisdiction of courts, it is often said that limitations on remedies (e.g., punitive damages) arise from the terms of a *compromis* or special agreement,[15] and there is a clear overlap between such jurisdictional

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[10] See article 58 (2) as adopted on first reading, and for a critique, *Second Report...*, A/CN.4/498/Add.4, pp. 13-15 (paras. 384-387).

[11] *Report ... 1999*, pp. 197-198 (paras. 441-447).

[12] See also below, para. 42.

[13] See C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987); D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999). Restitution, compensation, etc., were described as "remedies" by the Chairman of the Drafting Committee in introducing article 42 (1): *Yearbook ... 1992*, vol. I, p. 237 (para. 17).

[14] Cf. Arbitrator Mahmassani's discussion, in the same passage, of specific performance and restitution in the *Liamco* case: (1977) 62 *ILM* 140 at p. 198.

[15] On the relation between punitive damages and the terms of a *compromis*, see, *inter alia*, the *Lusitania* case (1923) 7 *UNRIAA* 32, at pp. 41-42; the case concerning the *Responsibility of*

issues as the power to indicate or order provisional measures and the obligation of cessation. This is a particular problem with declarations, which international courts frequently grant as a form of remedy, on the basis that the formal finding of a breach is in the circumstances sufficient reparation.[16] Indeed in many State responsibility cases (as in many national court cases in the field of public law), the primary relief sought is declaratory.

(3) **Rights and remedies: the problem of discretion**. There is a related point. The formulation of Part Two in terms of rights not only tends to exclude aspects of reparation such as declaratory relief; it also requires the draft articles to be formulated in terms which suggest that the appropriate form of reparation is predetermined by international law. The truth is that international courts and tribunals have shown considerable flexibility in dealing with issues of reparation.[17] In a system in which rules of responsibility can be formulated in terms of powers or judicial discretions, this is no great problem. In a system in which everything has been conceived in terms of rights and obligations,[18] the position is different, and it is one of the reasons why Part Two has been criticized alternately for excessive rigidity and unhelpful vagueness.[19]

On balance, these points do not call in question the basic structure or approach of Part Two. They will, however, need to be taken into account in considering particular provisions and especially in drafting.

8. Part II as adopted on first reading has both positive and negative features. On the positive side, key aspects of the draft articles (cessation, reparation and countermeasures) were formulated on the basis of detailed and careful reports of the

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Germany for acts committed after 31 July 1914 and before Portugal entered the war (1930) 2 *UNRIAA* 1035, at pp. 1076-1077; *Grimm v. Iran*, Case No. 71, Iran-United States Claims Tribunal (1983) 2 *IUCTR* 78, at pp. 78-79.

[16] See, e.g., *Corfu Channel case (Merits)*, I.C.J. Reports 1949, p. 4 at p. 35; *Rainbow Warrior Arbitration (New Zealand v. France)* (1990) UNRIAA, vol. XX, p. 217, at pp. 272-273 (paras. 122-123). See generally Gray, *Judicial Remedies*, pp. 127-131; Shelton, *Remedies in International Human Rights Law*, pp. 68-69.

[17] See, e.g., *Case concerning the Gabcikovo-Nagymaros Project I.C.J. Reports*, 1997 p. 7. For a case where this flexibility almost went to the point of infringing the *ne ultra petita* principle see the *Rainbow Warrior Arbitration (New Zealand v. France)* (1990) 82 ILR 499, at pp. 574-575 (paras. 116-20), 577-8 (paras. 124-8). Generally on the distinction between cessation and reparation see below, paragraphs 47-50, 54.

[18] But cf. article 42 (2), which provides that "account shall be taken" of contributory fault in determining the form and amount of reparation; article 46, which provides for assurances and guarantees "where appropriate". Both articles imply not merely a measure of discretion of flexibility but some form of third party settlement.

[19] The point can be illustrated by reference to the entitlement to interest on unpaid compensation. There is authority in some cases for the award even of compound interest; in others, no payment of interest may be appropriate, or the value of unpaid money can be taken into account in other ways. But it is very difficult to specify in advance the conditions under which interest (including compound interest) may be appropriate. See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1, award of 1 February 2000), paras. 96-107. Special Rapporteur Arangio-Ruiz's proposal for a separate article on interest was not retained by the Commission on first reading, and is reflected only by a vague reference in article 44 (2). See G. Arangio-Ruiz, *Second Report, Yearbook ... 1989*, vol. II (Part One), pp. 23-30, 56; commentary to article 44 [8], paras. (24)-(26), *Yearbook... 1993*, vol. II (Part Two), p. 73.

previous Special Rapporteur, Mr. Gaetano Arangio-Ruiz.[20] That work certainly does not need to be repeated: rather the focus should be on the formulation and possible elaboration of certain draft articles, in the light especially of the comments of Governments. On the negative side, there are a number of elements to be considered, both in relation to Part Two and Part Three:

- The relation between the concepts of reparation in article 42 and restitution in kind in article 43 has been criticized as confused and overlapping; more generally the question of the selection between forms of reparation (especially restitution and compensation) requires further attention.

- Whatever approach may be taken to the question of "international crimes" as defined in article 19 on first reading, articles 51 to 53 have been widely criticized as inadequate and as poorly integrated into the text.[21]

- A number of the general provisions contained in Part Two (e.g., article 37 (*lex specialis*) and article 39 (relationship to the Charter of the United Nations)) belong more properly in a final general Part, and should be made applicable to the draft articles as a whole. Further general provisions may also be required.[22]

- Part Three deals only with the settlement of disputes and not with the broader substantive topic of the implementation (*mise-en-œuvre*) of responsibility.

- So far as concerns the implementation of responsibility, there may be a case for dealing with such subjects as the loss of the right to invoke responsibility (by analogy with article 45 of the Vienna Convention on the Law of Treaties). A number of other issues may also fall within that general heading.

9. In addition, the division of Part Two into four chapters raises a number of questions:

- Chapter I purports to state the general principles applicable, but it mainly consists either of introductory or savings clauses, together with an extended "definition" of the injured State. To the extent that there are basic principles specific to Part Two, they are mostly in later chapters.

- Chapter II contains articles dealing with cessation and with reparation in the broad sense (restitution, compensation, satisfaction, assurances and guarantees of non-repetition). But cessation is distinct from reparation, and is treated in one respect by a provision in chapter I (article 36 (2)). Moreover, chapter II only sets out some of the "rights of the injured State", while others are specified in chapters III and IV. It would seem desirable to distinguish those consequences of an internationally wrongful act that concern the question of the continued performance of the obligation in question (e.g., cessation, and possibly assurances and guarantees of non-repetition) from those which

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[20] For the reports on State responsibility by Gaetano Arangio-Ruiz, see *Yearbook ... 1988*, vol. II (Part One), p. 6 (Preliminary Report); *Yearbook ... 1989*, vol. II (Part One), p. 1 (Second Report); *Yearbook ... 1991*, vol. II (Part One), p. 1 (Third Report); *Yearbook ... 1992*, vol. II (Part One), p. 1 (Fourth Report); document A/CN.4/453 and Add.1-3 (1993) (Fifth Report); document A/CN.4/461 and Add.1-3 (1994) (Sixth Report); document A/CN.4/469 and Add.1-2 (1995) (Seventh Report); document A/CN.4/476 and Add.1 (1996) (Eighth Report).

[21] See *Report ... 1998*, pp. 135-137 (paras. 298-301).

[22] E.g. the proposed article A (Responsibility of or for conduct of an international organization): see First Report, A/CN.4/490/Add.5, pp. 35-37 (paras. 256-262); *Report ... 1998*, p. 165 (paras. 427-429).

concern reparation in the proper sense. In addition, it may be useful to set out in chapter I the general principle of reparation, as a corollary of the general principles set out in articles 1 and 3. On that basis chapter II can be used to elaborate the content of reparation in relation to particular cases.

- Chapter III, dealing with countermeasures, does not seem to be concerned so much with the "content, forms or degrees" of State responsibility as with the reactions that may lawfully follow a breach of an international obligation so far as the injured State is concerned. The notion that countermeasures are instrumental, and are concerned not with punishing the responsible State but with inducing it to comply with its obligations of cessation and reparation, is expressed in article 47 and was endorsed by the International Court in the *Gabcikovo-Nagymaros* case.[23] It implies that the provisions on countermeasures might be better located in a Part (hereafter referred to as Part Two *bis*) dealing with the implementation of responsibility.[24]

- Chapter IV purports to set out the specific consequences of international crimes as defined in former article 19, but as noted in the First Report,[25] these consequences are rather limited and do not involve "penal" consequences as that term is normally understood. For example, they do not include punitive damages, let alone other sanctions which may be appropriate for the gravest breaches of international law. The Commission decided in 1998 to try to resolve the issues raised by article 19 through the concepts of obligations to the international community as a whole, and peremptory norms.[26] To the extent that such obligations have immediate legal consequences analogous to those dealt with in chapter II, they should no doubt be identified either in that chapter or elsewhere in Part Two. To the extent that such obligations may give rise to collective measures against the responsible State, they could be dealt with in the proposed Part Two *bis*.

- Nowhere in Part Two is there any treatment of situations where more than one State is injured by, or is responsible for, the same internationally wrongful act. Nor is there any express provision dealing with the relationship between the modes of reparation available to a State primarily affected by such an act and other States with a legal interest in the breach (the so-called "differently injured" States).[27] These issues are particularly important with multilateral obligations, i.e., obligations owed to a group of States collectively, or to the international community as a whole.

10. For these reasons, and others which will be developed in the course of this report, it is suggested that the remaining substantive sections of the draft articles could have the following structure:

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[23] *I.C.J. Reports 1997*, p. 7 at pp. 55-57 (paras. 83-87).

[24] For Mr. Arangio-Ruiz's reasons for including countermeasures in Part Two, and dispensing with the notion of the implementation of responsibility, see *Yearbook .... 1988*, vol. 2 (Part One), p. 10 (para. 19). No consideration was given to other issues relating to the invocation of responsibility than those concerned with countermeasures.

[25] A/CN.4/490/Add.1, para. 51.

[26] *Report ... 1998*, p. 147 (para. 331).

[27] An omission noted in the commentary to Article 42 [6 *bis*], footnote 155, in *supra*, footnote 19, p. 59.

Part Two. Legal consequences of an internationally wrongful act of a State

Chapter I. General principles

Chapter II. The forms of reparation

[Chapter III. Cases involving a plurality of States]

Part Two *bis*. The implementation of State responsibility

Chapter I. Invocation of the responsibility of a State

Chapter II. Countermeasures

[Chapter III. Invocation of responsibility to the international community as a whole]

Part Four. General provisions

This structure will incorporate the substance of all the draft articles in Part Two as adopted on first reading. It should also enable the outstanding issues identified above to be addressed.

11. In the present report, the draft articles will be discussed not in the order in which they currently stand in Part Two, but generally in their proposed new order. For the reasons explained in paragraph 6 above, Part Three on settlement of disputes will be set to one side for the time being.

II. Part Two. Legal consequences of an internationally wrongful act of a State

12. Part Two is currently entitled "Content, forms and degrees of international responsibility". This is neither very clear nor very illuminating as to the content of Part Two. For example, the taking of countermeasures hardly qualifies as part of the "content" of responsibility or as one of its "forms". This will not be a problem if, as is suggested, countermeasures are to be considered as an aspect of the implementation of responsibility (Part Two *bis*). Even so, a clearer and less convoluted title for Part Two is called for. The title "Legal consequences of an internationally wrongful act of a State" is suggested.

A. Chapter I. General principles

1. Title and content of chapter I

13. Chapter I is presently entitled "General principles". It consists of five articles, as follows:

Article 36. Consequences of an internationally wrongful act
Article 37. *Lex specialis*
Article 38. Customary international law
Article 39. Relationship to the Charter of the United Nations
Article 40. Meaning of injured State

A number of these articles are essentially savings or "without prejudice" clauses (articles 36 (2), 37, 38, 39). Article 36 (1) has an introductory character. Article 40

is formulated as a definition, whose operation is determined by the use of the phrase "injured State" in later articles. As noted above, if there are "general principles" in Part Two, they are hardly to be found in chapter I.

14. It is nonetheless appropriate that chapter I of Part Two should set out general principles as to the legal consequences of an internationally wrongful act of a State, just as chapter I of Part One does as to the requirements for the existence of an internationally wrongful act. In that respect, articles 41 and 42 (1) seem to state general principles, which could be included in this chapter alongside article 36, leaving the specific forms of reparation to be addressed in chapter II. The issues raised by article 40 also raise questions of general principle; the placement of that article can only be resolved in the context of a discussion of those questions.

15. On the other hand, articles 37 and 39 express principles or provisos that are applicable to the draft articles as a whole. They should be moved to new Part Four.

16. On that basis, four issues of general principle remain to be considered in the context of chapter I. They are:

- The general principle of reparation arising from the commission of an internationally wrongful act by a State. This corresponds to articles 36 (1) and 42 (1);
- The question of cessation of any continuing wrongful act by the responsible State (corresponding to articles 36 (2) and 41); it is convenient to discuss article 46 (assurances and guarantees against repetition) in the same context;
- The question whether the legal consequences of an internationally wrongful act set out in Part Two are comprehensive. This corresponds to article 38;
- The question which State or States can be considered injured by an internationally wrongful act. This corresponds to article 40.

These will be dealt with in turn.

2. The general principle of reparation[28]

(a) Current provisions

Article 36 (1)

17. Article 36 is a formal introductory article, entitled "Consequences of an internationally wrongful act". Paragraph 2 deals with an aspect of cessation and is considered below. Paragraph 1 provides that:

[28] See Arangio-Ruiz, *Preliminary Report*, p. 6, *Second Report*, p. 1, and see further I. Brownlie, *State Responsibility* (Oxford, Clarendon Press, 1983) chap. XIII; B. Graefrath, "Responsibility and Damage Caused: Relations between Responsibility and Damages", *R.C.A.D.I.*, vol. 185 (1984-II) pp. 9-149; M. Iovane, *La riparazione nella teoria e nella prassi dell' illicito internazionale* (Milan, Giuffrè, 1990); E. Decaux, "Responsabilité et réparation", in S.F.D.I., *La responsabilité dans le système international* (Paris, Pédone, 1991), pp. 147-190; C. Dominicé, "La réparation non contentieuse", ibid., pp. 191-223 and "De la réparation constructive du préjudice immatériel souffert par un Etat", in *Liber Amicorum Jiménez de Aréchaga* (Montevideo, Fundación de Cultura Universitaria, 1994), pp. 505-522.

> "1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part."

According to the commentary, its "sole object" is to make "the transition, and the link" between Parts One and Two.[29] The commentary also notes that article 36 (1) "does not exclude that an internationally wrongful act entails legal consequences in the relationships between States and *other* 'subjects' of international law".[30] That is of course true, and it follows from article 1 itself, which covers all international obligations *of* the State and not only those owed *to* other States. Thus the draft articles cover, for example, human rights violations — that is to say, cases where the primary beneficiary of the obligation is not a State.[31] On the other hand, Part Two does not address the invocation of responsibility by a non-State entity such as an international organization[32] (or even a private entity, in those cases where such invocation is possible[33]), or the reparation available to the primary victim or beneficiary in such cases. This apparent discrepancy will be discussed further in the context of the definition of "injured State" under article 40.

18. Very few Governments have commented so far on article 36, no doubt owing to its introductory character. Argentina considers that chapters I and II of Part Two "adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner".[34] France suggests a new wording for article 36, in order to relate its provisions to the obligation of cessation in article 41. According to the French proposal, article 36 (1) could be drafted as a savings clause, which would read as follows:

> "This obligation [of performance of the obligation and cessation of the wrongful conduct] is without prejudice to the legal consequences of an internationally wrongful act as set out in this Part."[35]

Article 42 (1), (3), (4)

19. In conjunction with article 36 (1) it is also necessary to consider article 42. Paragraph 2 deals with the attenuation of responsibility on account of the negligence or wilful act or omission of the victim, i.e., with cases of contributory fault. That concept should probably find a place in the more detailed provisions of chapter II rather than as a general principle, and it will be discussed subsequently. The remaining provisions of article 42 are as follows:

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[29] Commentary to article 36 [1], para. (1), *Yearbook... 1983*, vol. II (Part Two), p. 42.

[30] Commentary to article 36 [1], para. (4) (emphasis in original), ibid.

[31] Express reference to human rights obligations is made in articles 19 (3) (c), 40 (2) (e) (iii) and 50 (d) as adopted on first reading.

[32] See Crawford, First Report, A/CN.4/490/Add.4 and Corr.1, pp. 11-12, and Add.5, pp. 28-29, 35-37; and draft article A as provisionally adopted by the Drafting Committee in 1998 (A/CN.4/L.569 and Corr.1).

[33] For example in cases where private parties have standing before an international tribunal for the vindication of rights conferred by treaty (e.g. ICSID Tribunals, international human rights bodies).

[34] A/CN.4/488/Add.1, p. 6.

[35] A/CN.4/488, p. 92.

"*Reparation*

"1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

"...

"3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

"4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation."

20. Special Rapporteur Arangio-Ruiz did not originally propose any version of article 42, although his reports address a number of the issues it covers. It was formulated by the Drafting Committee as "a general *chapeau* article on the concept of reparation, which would list the various forms of reparation and regroup the substantive legal consequences of a wrongful act and clarify their relationship with one another".[36] The commentary notes that, consistently with the understanding of the term "reparation" embodied in article 36 (2) (d) of the Statute of the International Court of Justice, paragraph 1 "lays down the general rule that full reparation should be provided so as to wipe out, to the extent possible, all the consequences of the internationally wrongful act".[37] It also notes the contrast between article 41 (cessation), which is formulated as an obligation of the responsible State, and article 42, which refers to the right of "the" injured State.[38]

21. The commentary goes on to note that the obligation of reparation does not extend to indirect or remote results which may flow from a breach, as distinct from those flowing directly or immediately. "The injury may ... be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory — an issue which is extensively dealt with in the commentary to article [44]."[39] But the requirement of a sufficient causal link between the conduct and the harm complained of applies not only to questions of compensation, but to the principle of reparation itself.

22. Governments which have commented on article 42 express general approval of the principle of full reparation embodied in paragraph 1. Germany, for example, expresses its "agreement with the basic rule ... that the injured State is entitled to full reparation in the form mentioned".[40] However, most of these Governments have reservations as to paragraphs 2 and 3, which provide "two potentially significant

[36] *Yearbook ... 1992*, vol. I, p. 216 (para. 14), and see further ibid., paras. 15-28, for the Drafting Committee's account of the new article.

[37] Commentary to article 42 [6 *bis*], para. (2), in *supra* footnote 19, p. 59.

[38] Commentary to article 42 [6 *bis*], para. (4), ibid.

[39] Commentary to article 42 [6 *bis*], para. (6), ibid.

[40] A/CN.4/488, p. 104. See also comments by United States (ibid.), United Kingdom (which regards the draft article "as largely uncontroversial": ibid.), Mongolia (ibid., p. 103), and Australia (A/C.6/54/SR.23, para. 43).

exceptions from the general principle of full reparation".[41] The obligation not to deprive the population of its own means of subsistence gives rise to particular concern, on the ground that it could be "used as a pretext by the wrongdoing State to refuse full reparation".[42] The United Kingdom of Great Britain and Northern Ireland questions paragraph 3 on another ground, viz., its relevance in the context of reparation. In its opinion, the only form of reparation paragraph 3 could refer to is compensation; but even in that case, it raises difficult issues (e.g., as to the level of financial hardship required). In addition, it does not explain "why [ability to pay] should not be a factor in all cases",[43] and not only when there is a risk of deprivation. By contrast, Germany considers that "paragraph 3 has its validity in international law and in the context of the draft article".[44] It refers to international practice in such cases as egregious breaches caused by war, where full reparation has not been awarded for every single case of damage sustained. Such cases are justified so as to avoid beggaring the defeated State and causing further instability in the future. It calls for careful examination by the Commission of the implementation of Security Council resolutions 662 (1990) and 687 (1991), requiring full reparation for acts related to the aggression against Kuwait.[45]

(b) A proposed general principle

23. The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the *Chorzów Factory Case (Competence)*, in the following words:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation is therefore the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[46]

In this passage the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.[47]

24. In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

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[41] United States (A/CN.4/488, p. 104).

[42] Japan (A/CN.4/492, p. 14). See also United States (acknowledging that a claim for prompt reparation "could lead to serious social instability" but criticizing the "loophole" and "avenues for abuse" created by paragraph 3; A/CN.4/488, p. 107); France (suggesting deletion of the paragraph; ibid., p. 106); Australia (A/C.6/54/SR.23, para. 43).

[43] A/CN.4/488, p. 105. The British Government suggests a separate article on reparation in the form of a "statement of principle concerning the making of reparation and [pointing out] that an injured State cannot insist upon a particular kind or level of reparation" (ibid.).

[44] Ibid., p. 106.

[45] Ibid., p. 107.

[46] *P.C.I.J., Series A*, No. 9 (1927), p. 21.

[47] As the Court noted: ibid., p. 17.

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and, in particular, by the decisions of arbitral tribunals — is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[48]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[49] In the second sentence it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act — that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

Reparation as obligation or right?

25. In each of the above passages, the Court was able to formulate the principle of reparation without specifying to whom reparation was owed, i.e., without using the term "injured State" or any equivalent to it. One reason was, perhaps, that concurrent proceedings by the German companies before a mixed arbitral tribunal presented a difficulty for its exercise of jurisdiction over essentially the same matter under the form of an inter-State claim. By contrast, article 42 (1), like all other articles in Part Two, chapter II, except article 41 (cessation), is formulated in terms of the rights of the "injured State". This works well enough in the strictly bilateral context, where the obligation in question is owed exclusively by one State to another and the latter is (correspondingly) the only possible injured party. But it creates a significant difficulty in those cases where the same obligation is owed simultaneously to several, many or all States, some or all of which are legally interested in its breach. The commentary to article 42 notes that:

> "... The possible implications for the provisions on reparation of the existence of a plurality of injured States, including the question of the so-called differently or indirectly injured States, will be considered at a later stage."[50]

As it happened, the articles on reparation on first reading were discussed on the footing that only breaches of bilateral obligations were involved, and were not reconsidered in the context, for example, of articles 51 to 53.[51]

26. This question will be discussed in greater depth when considering article 40. For present purposes, however, it seems possible to formulate the general obligation

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[48] *P.C.I.J., Series A*, No. 17 (1928), p. 47.

[49] Cf. P-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Recueil des cours*, vol. 188 (1984-V) 9 at p. 94, who uses the term "restauration" to convey this general idea.

[50] Commentary to article 42 [6 *bis*], footnote 155, in *supra*, footnote 19, p. 59. To the same effect, commentary to article 44 [8], para. (15), ibid, p. 71.

[51] The commentary subsequently describes the general principle of reparation in terms of an obligation of the responsible State, without reference to the notion of "injured State": commentary to article 42 [6 *bis*], para. (6), in *supra*, footnote 19, p. 59.

of reparation as the simple and immediate corollary of a State's responsibility, i.e., as an obligation of the State concerned resulting from the breach. The commentary to article 42 justifies the translation of reparation as a right of the injured State on the ground that "it is by a decision of the injured State that the process of implementing this right in its different forms is set in motion".[52] As to the choice between different forms of reparation, this may well be so. In particular, the victim of an internationally wrongful act is, under normal circumstances, entitled to elect compensation rather than restitution in kind, to forgo claims to satisfaction, or indeed to focus on cessation and future performance rather than seeking reparation at all. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility, the fact remains that the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form which reparation should take in the circumstances may be contingent. For these reasons, the proposed general article should be formulated in terms of the obligations of the State which has committed the internationally wrongful act.[53]

Other issues of formulation: causation, remoteness and mitigation of damage

27. The proposed general article should also specify that the subject matter of reparation is, globally, the situation resulting from and ascribable to the wrongful act.[54] As noted in the commentary to Part One, State responsibility is not determined simply on the basis of "factual causality".[55] Rather, the allocation of harm or loss to a wrongful act is, in principle, a legal and not a merely historical or causal process. That principle is not limited to compensation. It applies, at least, to restitution in kind and probably to other forms of reparation as well, and it is too important to be stated, as at present, only in the commentary to article 44.

28. The question is how such a link should be expressed. In State practice, arbitral decisions and the literature, various terms are used. For example, reference may be made to losses "attributable [to the wrongful act] as a proximate cause",[56] or to damage which is "too indirect, remote and uncertain to be appraised",[57] or to "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[58] Thus "factual causality" is a necessary but not a sufficient

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[52] Commentary to article 42 [6 *bis*], para. (4), in *supra*, footnote 19, p. 59.

[53] See, to similar effect, A. de Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer, The Hague, 1996) pp. 138-40.

[54] For discussion of the causal link requirement, see Arangio-Ruiz, *Second Report*, pp. 12-16, and commentary to article 44 [8], paras. (6)-(13), in *supra*, footnote 19, pp. 68-70. See further C. Gray, *Judicial Remedies in International Law*, pp. 21-26.

[55] Commentary to article 3, para. (6), *Yearbook ... 1973*, vol. II, p. 181.

[56] See United States-Germany, Mixed Claims Commission, *Administrative Decision No. 2*, Reports of International Arbitral Awards, vol. VII, p. 23, at p. 30 (1923).

[57] See the *Trail Smelter* arbitration (1938) 3 RIAA 1905 at p. 1931, reprinted in 1 *International Environmental Law Reports* (C. Robb, ed.) (Cambridge, Cambridge University Press, 1999) 231 at p. 271.

[58] Security Council resolution 687 (1991), para. 16 (emphasis added). This was a Chapter VII resolution, but it is expressed to reflect Iraq's liability "under international law ... as a result of Iraq's unlawful invasion and occupation of Kuwait". The United Nations Compensation Commission and the Governing Council have provided some guidance on the interpretation of

condition for reparation. There is a further element, associated with the exclusion of harm that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "proximity" or "foreseeability".[59] But other factors may also enter into the calculation: for example, whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[60]

29. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[61] But it is clear that there is an element, or complex of elements, over and above that of natural causality, and that this should be reflected in the proposed statement of the general principle of reparation.

30. A further element affecting the scope of reparation is the question of mitigation of damage. Even a wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[62] The point was clearly made in this sense by the International Court in the Case concerning the *Gabcikovo-Nagymaros Project*:

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the requirements of directness and causation under para. 16. See e.g. *Claims Against Iraq (Category "B" Claims)*, Report of 14 April 1994, United Nations document S/AC.26/1994/1, 109 ILR 206; approved by Governing Council Decision 20, United Nations document S/AC.26/Dec.20 (1994), 26 May 1994, 109 ILR 622; *Well Blowout Control Claim*, Report of 15 November 1996, S/AC.26/1994/1, paras. 66-86, 109 ILR 480 at pp. 506-11, approved by Governing Council Decision 40, S/AC.26/Dec.40 (1996), 17 December 1996; 109 ILR 669.

[59] In some national legal systems, different criteria are used to deal with the problem of remoteness of damage, depending on the nature of the claim. For example, in the common law, "foreseeability" was the criterion in cases of negligence; "directness" in cases of trespass. Like the two torts, the two tests overlapped but were not identical. For comparative reviews of issues of causation and remoteness see e.g. H.L.A. Hart & A. M. Honoré, *Causation in the Law* (Oxford, Clarendon Press, 2nd ed., 1985); A. M. Honoré, "Causation and Remoteness of Damage", *in International Encyclopedia of Comparative Law* (A. Tunc, ed.), vol. XI, Part 1, chap. VII, 156 p.; K. Zwiegert and H. Kötz, *Introduction to Comparative Law* (3rd ed.., Oxford, Clarendon Press, 1998), pp. 601-627 (esp. p. 609ff.); B. S. Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* (Oxford, Clarendon Press, 3rd ed., 1997), pp. 95-108, with many references to the literature.

[60] An example is provided by the decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America, Cases Nos. A15(IV) and A24*, Award No. 590-A15(IV)/A24-FT, 28 December 1998, discussed in the author's Second Report (1999) at paras. 65-67. The Tribunal envisaged that the damages payable would be those which resulted directly from the breach, on the assumptions: (a) that the United States had achieved by other lawful means the result of allowing reinstitution or resumption in its own courts of cases falling outside the Tribunal's jurisdiction, and (b) that Iran took reasonable steps to protect itself in the suspended cases. This conclusion does not follow from consideration of factual causality.

[61] P. S. Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, Oxford, 5th ed., 1995) p. 466.

[62] In the *Well Blowout Control Claim*, a Panel of the United Nations Compensation Commission noted that "under the general principles of international law relating to mitigation of damages ... the Claimant was not only permitted but indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused": (1996) 109 ILR 480 at pp. 502-503 (para. 54). This is acceptable if it means that the costs of reasonable mitigation are a recoverable consequence of the wrongful act, and conversely that harm arising from a failure to mitigate may not be recoverable.

> "Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out variant C. It stated that 'it is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.' It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act."[63]

Reducing reparation in cases of concurrent causes

31. An associated issue is the problem of concurrent causes, i.e., of the cases (very frequent in practice) where two separate causes combine to produce the injury. Both are efficient causes of the injury, without which it would not have occurred. For example, in the *Diplomatic and Consular Personnel* case,[64] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[65] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Many other examples could be given.

32. This issue is likewise addressed in the commentary to article 44 rather than in the text. According to the commentary:

> "Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases ... to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability. In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State."[66]

33. There are several difficulties with the position expressed in the commentary. The first is that it is not reflected at all in article 44, or generally in Part Two. Except in the special case of contributory fault (dealt with in article 42 (2)), there is no provision for reparation to be reduced or attenuated because the harm in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State.[67] If the Commission wishes to endorse the

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[63] *I.C.J. Reports, 1997*, p. 7 at p. 55 (para. 80).

[64] *I.C.J. Reports, 1980*, p. 3 at pp. 29-32.

[65] *I.C.J. Reports, 1949*, p. 4 at pp. 17-18, 22-23.

[66] Commentary to article 44 [8], para. (13), in *supra*, footnote 19, p. 70.

[67] The reduction of compensation in cases of contributory fault, which is envisaged in article 42 (2), occurs not because the internationally wrongful act of the State is not an efficient cause of the injury but out of considerations of equity. The default of the victim in contributing to the

principle of attenuation of damage for concurrent causes (other than in cases of contributory fault), it should say so in the articles themselves.

34. The second difficulty, however, is that this principle is not consistent with international practice and the decisions of international tribunals. In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines.[68] This was despite the fact that the Court was well aware that Albania had not itself laid the mines. Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. Thus in the *Diplomatic and Consular Personnel* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[69] Such a conclusion is obvious, since at the international level the United States of America had no opportunity for recourse against the captors. But it should follow in any event from the breach of the obligation.

35. It is true that cases can occur where an identifiable element of harm can properly be allocated to one of several concurrently operating causes alone. But unless some part of the harm can be shown to be severable in causal terms from that attributed to the responsible State, the latter should be held responsible for all the consequences (not indirect or remote) of its wrongful conduct. Indeed in the *Zafiro* claim the Tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> "We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole. In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed."[70]

36. Thirdly, it should be noted that the approach to concurrent causes proposed in the commentary is inconsistent with the way in which these issues are consistently approached in national law. As Weir concludes, after a thorough review of the comparative experience:

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injury limits the reparation to which it would otherwise be entitled. There is no inference to be drawn for the general question of concurrent causes.

[68] See *Corfu Channel (Assessment of the Amount of Compensation), I.C.J. Reports 1949*, p. 244 at p. 250. It should be pointed out, however, that Albania did not appear at this stage, so that possible countervailing factors may not have been put to the Court.

[69] *I.C.J. Reports, 1980*, p. 3 at pp. 31-33. See Crawford, First Report, A/CN.4/490/Add.5, para. 283.

[70] *Earnshaw & others (Great Britain v. United States). The Zafiro* (1925) 6 UNRIAA 160 at pp. 164-165.

> "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable."[71]

37. The case where concurrent acts of several States together cause injury is dealt with in further detail below. For present purposes it is enough to conclude that the notion of a sufficient causal link which is not too remote should be incorporated in the proposed general principle of reparation. The commentary should make it clear that, once it is shown that the harm suffered has been caused by the wrongful act of a State, the State must make reparation therefor. No further qualification is required in terms of any notion of concurrent cause.

(c) Article 42 (3) and (4)

38. Article 42 (3) states that reparation must not "result in depriving the population of a State of its own means of subsistence". According to the commentary, this provision was intended to address extreme cases where the demand for reparation would result in destitution for the population of the responsible State, and was evidently aimed at such cases as the massive demands for war reparations made against Germany at the end of the First World War. It notes further that:

> "This has, of course, nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized. But in other contexts ... the amounts [of compensation] required, or the terms on which payment is required to be made, should not be such as to deprive the population of its own means of subsistence. The language of paragraph 3 ... reflects a legal principle of general application."[72]

Not all members of the Commission agreed with the proviso. In particular it was pointed out that "the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds".[73] Government comments on paragraph 3 have also been divided.[74]

39. There can be no doubt that, as specified in article 1, paragraph 2, of the International Covenants on Human Rights of 1966, a people must not be deprived of its own means of subsistence. Thus, for example, measures taken in the framework of inter-State relations should not be such as to threaten the starvation of the people of a State. The problem is to see how this principle can apply in the context of the secondary obligation of reparation. As to restitution, the core element of restitution

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[71] J.A. Weir, "Complex Liabilities", in *International Encyclopedia of Comparative Law*, vol. XI, *Torts* (A. Tunc, Chief Editor, 1983) p. 41. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident Cases (United States of America v. Bulgaria)* when it said, referring to articles 38 (1) (c) and (d) of the Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage". Memorial of 2 December 1958, in *Pleadings* ... p. 229.

[72] Commentary to article 42, para. 8 (a), *Yearbook ... 1996*, vol. II (Part Two), p. 66.

[73] Ibid., para. 8 (b). For the debate see *Yearbook ... 1996*, vol. I, pp. 153, 155.

[74] See above, para. 22.

is the return of what was wrongfully taken. It is true that this may require active measures and is not limited to the return of physical items such as persons, property or territory. Nonetheless, the notion of restitution in kind should not be taken too far, nor should it be confused with reparation in the general sense. Thus it is difficult to conceive of cases of restitution which would deprive a people of its own means of subsistence. Indeed if the case is potentially so extreme, rather than depriving that people of their own means of subsistence, restitution would rather require the return to another people of *their* means of subsistence, wrongfully taken.[75]

40. As for satisfaction or guarantees against repetition, they are often symbolic in form, or they involve practical steps such as apologies or acknowledgements of wrongdoing, or perhaps measures such as prosecution of those said to be guilty of the violation. As for damages given by way of satisfaction, if they are not agreed between the parties, in practice they will only be payable on the basis of reasoned decisions by a court, tribunal or other body with jurisdiction over them. There is no history of courts or tribunals making excessive orders or awards in these categories.

41. Thus the real problem, if there is one, reduces itself to issues of monetary compensation for losses arising directly out of an internationally wrongful act.[76] It is true that in cases of egregious or systematic breaches such compensation may be very large, as indeed have been the amounts fixed under the heading of compensation by the United Nations Compensation Commission.[77] But this is rather exceptional,[78] and in any event a distinction has to be drawn between the quantum of

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[75] If it is possible that a case of restitution might deprive the people of the responsible State of their own means of subsistence without having an equivalent effect on the people of the injured State, restitution would presumably be excluded by the disproportionality test in article 43 (c).

[76] Overhanging the debate is the damaging "precedent" of the Versailles settlement of 1919 and the war guilt clause. But this was in a dictated peace treaty, and the amounts involved far exceeded anything a tribunal would have awarded for unlawful acts committed by Germany following the outbreak of the war. For the historical debate see e.g., J. M. Keynes, *The Economic Consequences of the Peace* (London, 1919); E. Mantoux, *The Carthaginian Peace* (OUP, London, 1946), and especially B. Kent, *The Spoils of War. The Politics, Economics and Diplomacy of Reparations 1918-1932* (Oxford, Clarendon Press, 1989). On the Dawes Plan see H. Coing in (1992) 2 *Enc. P.I.L.* 961.

[77] The Commission has made substantial decisions favouring claimants, but at the same time it has massively reduced the scope of the claims made, and this in a non-adversarial procedure. For example, in its decision of 10 December 1999 the Governing Council approved payment of 88 government claims in the E2 category aggregating US$ 290 million. But this was in response to 177 claims aggregating $2.16 billion. Generally on the Commission see R. B. Lillich (ed.), *The United Nations Compensation Commission* (Transnational Publishers, Irvington, 1995); P. d'Argent, "Le Fonds et la Commission de compensation des Nations Unies", *R.B.D.I.*, 1992, pp. 485-518; B. Stern, "Un système hybride: la procédure de règlement pour la réparation des dommages résultant de l'occupation illicite du Koweit par l'Irak", *McGill Law Journal*, vol. 37, 1992, pp. 625-644; J. Crook, "The United Nations Compensation Commission – A New Structure to Enforce State Responsibility" (1993) 87 *AJIL* 144; R. J. Bettauer, "The United Nations Compensation Commission – Developments since October 1992" (1995) 89 *AJIL* 416; M. Frigessi di Rattalma, "Le régime de responsabilité internationale institué par le conseil d'administration de la Commission de compensation des Nations Unies", *R.G.D.I.P.*, 1997, pp. 45-90; V. Heiskanen and R. O'Brien, "UN Compensation Panel Sets Precedents on Government Claims" (1998) 92 *AJIL* 339.

[78] In dealing with compensation claims, courts have often contented themselves with quite modest awards, or even with suggestions for a zero-sum solution embodying other elements of restoration of the legal relationship. See e.g., *Case concerning the Gabcikovo-Nagymaros Project, I.C.J.*

compensation, which by definition reflects the actual losses suffered as a result of the breach, and the mode of payment. In extreme circumstances one might envisage the plea of necessity or *force majeure* as a basis for delaying payments which have become due, a possibility allowed for in the *Russian Indemnity* case.[79] But again, in practice, international financial institutions have developed methods for aggregating and rescheduling sovereign debt, and the amounts actually awarded or agreed to be paid by way of compensation since 1945 are relatively small in relation to the total public finances or public debt of the States concerned.

42. To summarize, there is no history of orders for restitution in the narrow sense, or of the award of damages by way of satisfaction, which have threatened to deprive a people of its own means of subsistence. As to compensatory damages, paragraph 3 seems to confuse questions of the quantum due (a matter by definition related to the losses actually resulting from the wrongful act in question) and questions of the mode of payment. The potential problem of States unable for the time being to make large compensation payments is sufficiently addressed by the recognition that the circumstances precluding wrongfulness in chapter V of Part One apply equally to obligations arising under Part Two.[80] It is sufficient that this be noted in the commentary.

43. Turning to article 42 (4), this makes the obvious point that a State may not rely on its internal law in order to avoid its obligation to make reparation for wrongful conduct.[81] There can be no doubt as to the principle, but it is already clearly stated in article 4, which is quite general in its application and accordingly applies to the secondary obligations set out in Part Two. Again, it will be sufficient to point this out in the commentary.[82]

3. Cessation and related issues

(a) Current provisions

44. As adopted on first reading, the draft articles contain two provisions dealing with the related questions of the impact of a breach of an international obligation on its continued performance, and with the cessation of such a breach. These are articles 36 (2) and 41.[83]

Reports, 1997, p. 7 at p. 81 (para. 153) (distinguishing claims for damages from money due in respect of the construction of the Project).

[79] UNRIAA, vol. XI, p. 431 at p. 443 (1912). Though treated there as a matter of *force majeure*, it was more a case of necessity. The plea was rejected on the facts. The case is referred to in the commentary to article 33, para. (7), *Yearbook ... 1980*, vol. II (Part Two), p. 36.

[80] See above, para. 7, point (1).

[81] See Arangio-Ruiz, Preliminary Report, p. 40, para. (125). That principle can of course be qualified by the relevant primary rule, or by a secondary *lex specialis*: see e.g. article 50 of the European Convention of Human Rights, 1950 (just satisfaction in lieu of full reparation "if the internal law of the said Party allows only partial reparation to be made"); see now article 41 as adopted by the Eleventh Protocol, 1994.

[82] For the proposed formulation of the general principle see below, para. 119.

[83] Both provisions were added at the suggestion of Mr. Arangio-Ruiz. For his detailed examination of the issues see *Yearbook ... 1988*, vol. II, Part One, pp. 12-21 (paras. 29-52).

45. Article 36 (2) is in the form of a savings clause. It provides that:

> "2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached."

The commentary notes that:

> "The fact that, as a result of the internationally wrongful act, a new set of relations is established between the author State and the injured State does not mean that the previous relationship disappears ipso facto. Even if the author State complies with its secondary obligation, it is not automatically relieved of its duty to perform the obligation it has breached. Paragraph 2 states this rule. It does so in the form of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation."[84]

It is the continuation of an international obligation notwithstanding a breach which is a necessary basis for the occurrence of a continuing wrongful act.[85]

46. Article 41 deals with the cessation of wrongful conduct, presently within the framework of Chapter II. It provides that:

> "A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred."

47. The commentary notes that the obligation of cessation might well be ascribed to the normal operation of the relevant primary rule. But it justifies its inclusion in the draft articles on a number of grounds. These include its connection to reparation, especially at the time of the wrongful act, and its practical importance in interstate relations.[86] It notes that cessation is often the main focus of the controversy produced by conduct in breach of an international obligation. Moreover cessation, though related to restitution as the primary form of reparation, is not subjected to the limitations to which restitution is subject.[87] The commentary refers to the decision of the tribunal in the *Rainbow Warrior* arbitration, and in particular to the following passage:

> "The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued."[88]

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[84] Commentary to article 36 [1], para. (5), in *supra*, footnote 19, p. 55.

[85] For the notion of a "continuing wrongful act" see article 24 (2) (as provisionally adopted on second reading, A/CN.4/L.574 and Corr.1-4), and Crawford, Second Report, A/CN.4/498, paras. 107-115.

[86] Commentary to article 41 [6], paras. (4)-(5), *supra*, footnote 19, pp. 55-56.

[87] Ibid., para. (6).

[88] *UNRIAA*, vol. XX, p. 217 (30 April 1990), at p. 270, para. 114, cited in commentary to article 41 [6], para. (13), *supra*, footnote 19, p. 57.

48. Article 41 has attracted very few comments from Governments, probably because it seems largely uncontroversial. In the view of Venezuela, the obligation to cease a wrongful conduct appears as "the first necessity".[89] The United Kingdom suggests an addition to the commentary to that provision making it clear that, when a circumstance precludes the wrongfulness of a particular conduct, the State concerned "remains under a duty to act in accordance with its international obligations and is internationally responsible if it fails to do so immediately when the circumstances generating the defence cease to obtain".[90] France proposes the deletion of article 41, the substance of which would be embodied in a new version of article 36, paragraph 1.[91]

(b) The place of cessation in the draft articles

49. As the above passage from the *Rainbow Warrior* award suggests, the breach of an international obligation raises two immediate issues, apart from the question of reparation. The first is the effect of the responsible State's conduct on the obligation which has been breached; the second is the cessation of the breach, if it is continuing. Both are aspects of the key question which the breach of an international obligation raises: that is, the restoration and future of the legal relationship concerned.

50. The main doubt raised about article 41 is that the cessation of a continuing wrongful act can be seen as a function of the obligation to comply with the primary norm. On that view, it is not a secondary consequence of a breach of an international obligation and it has no place in the draft articles. The Special Rapporteur does not agree with this analysis, for reasons that can be rather summarily stated:

(1) The question of cessation can only arise in the event of a breach. What must then occur depends of course on the interpretation of the primary rule, but also on the secondary rules relating to remedies, and it is appropriate that they be dealt with, at least in general terms, in a text dealing with the consequences of an internationally wrongful act.

(2) The notion of a continuing wrongful act is already contained in the draft articles, and is a common feature of cases involving State responsibility; its consequences should be spelled out in Part Two.

(3) It is desirable to include a provision corresponding to article 41. Not to do so might imply that a State which offers reparation in some form can excuse itself from continuing compliance with its obligations, whereas it must be a matter for the other parties to the obligation to accept such a proposal.

(4) Many responsibility cases are more concerned to establish whether there has been a breach, and to reinstate performance, than they are to extract reparation for past events.

(5) There is a close relationship between the concepts of cessation and restitution, and a clear account of that relationship needs to be

[89] A/C.6/54/SR.23, para. 56.
[90] A/CN.4/488, p. 103.
[91] Ibid., p. 92. For the French proposal see below, para. 52.

established in order to formulate the principle of restitution in a satisfactory way.[92]

(6) There is no support in Government comments for the deletion of article 41.

(c) Question of placement and formulation

51. Article 36 (2) is of course concerned with the continuation of the obligation rather than the cessation of the wrongful act, which is the subject of article 41. The distinction is both clear and important, and for the reasons given both provisions should be retained. But the Special Rapporteur agrees with the view, expressed for example by the Government of France, that the two issues should be brought into relation to each other. It is suggested that both aspects of cessation, as an initial requirement following upon the breach of an international obligation, should be included among the general principles in chapter I of Part Two.

52. As to the formulation of these provisions, France proposes that they be combined in a single new version of article 36, as follows:

> "(1) A State which has committed an internationally wrongful act is bound, with respect to the injured State, to perform the obligation it has breached or to cease any wrongful conduct having a continuing character.
>
> "(2) This obligation is without prejudice to the legal consequences of an internationally wrongful act as set out in this Part."[93]

Paragraph (1) conflates the two questions presently treated separately in articles 36 (2) and 41, and thus tends to obscure the distinction between them. In the Special Rapporteur's view it is desirable that they should both be treated in a single article, which would provide that the continuation of the obligation breached is (unless otherwise agreed or determined) not affected by the internationally wrongful act, and that the responsible State is bound to cease any continuing act in breach of that obligation.[94] The proposed paragraph (2) would substitute for the former article 36 (1), but this has a useful introductory function for Part Two as a whole, and might well be retained in its present positive formulation.

(d) Assurances and guarantees of non-repetition

53. Related to this question is that of assurances and guarantees against repetition, currently dealt with in article 46, which provides as follows:

> "The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."

Evidently if the obligation has ceased following its breach, no assurances or guarantees can be relevant. It seems more appropriate to treat article 46 in the present context — i.e., the continuation and repair of the legal relationship affected by the breach — rather than treating it as an aspect of the secondary obligation of reparation.

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[92] The relationship is discussed in further detail in relation to article 43, below.

[93] A/CN.4/488, p. 92.

[94] See below, para. 119, for the text of the proposed provision.

54. The commentary to article 46 notes that assurances and guarantees against repetition have often been treated as an aspect of satisfaction. It argues against that approach, on the ground that:

> "assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to re-establish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore presuppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which ... should not be automatically available to every injured State, particularly in the light of the broad meaning of that term in [article 40]."[95]

Thus "the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily";[96] the question is not one of reparation but, as it were, a reinforcement of an (*ex hypothesi* continuing) legal relationship. In this sense assurances and guarantees relate to future performance of the obligation, on the footing that it has survived the breach. They might be described as the positive aspect of future performance, where cessation of any continuing wrongful act is its negative aspect (and the continuation in force of the obligation is a necessary assumption of both).

55. The commentary goes on to describe the different forms which assurances and guarantees may take, including for example the repeal of the legislation which allowed the breach to occur.[97] But while the commentary "recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant",[98] the article itself makes no attempt to specify the content of such an obligation, taking refuge in the phrase "where appropriate". This implies that the obligation to provide guarantees and assurances is a weak or even illusory one, in the absence of some third party competent "to determine if the conditions for the granting of [an] ... exceptional remedy are met and also to deny abusive claims which would impair the dignity of the wrongdoing State".[99]

56. With the exception of Germany, the few Governments which have commented on article 46 are generally supportive of it.[100] That does not mean however that they

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[95] Commentary to article 46 [10 *bis*], para. (1), *supra*, footnote 19, pp. 81-82.

[96] Ibid., para. (2).

[97] Ibid., para. (4), citing the views of the Human Rights Committee in the *Torres Ramirez* case, Decision of 23 July 1980, A/35/40, p. 126 (para. 19). In those cases where the very existence of legislation involves a breach of an international obligation, the repeal of the legislation would be an aspect of cessation. In the more common case, the breach is not the result of the legislation but of its implementation in a given situation: see e.g. the Report of the WTO Panel, *United States — Sections 301-310 of the Trade Act of 1974* (WT/DS152/R, 22 December 1999), para. 7.46 ff. In the latter case its repeal may not be actually required, but it may nonetheless constitute an important assurance for the injured State(s). This illustrates the close connection between cessation and assurances of non-repetition.

[98] Commentary to article 46 [10 *bis*], para. (5), *supra*, footnote 19, p. 83.

[99] Ibid.

[100] See comments made by the Czech Republic (according to which these assurances and guarantees "constitute a potentially critical element of reparation"; A/CN.4/488, p. 114), Mongolia (considering the provision to be "highly important"; ibid., p. 115) and Argentina (A/CN.4/488/Add.1, p. 6).

share the same view as to its scope and purpose. Argentina considers that States not directly affected by a wrongful act may ask for cessation and guarantees of non-repetition, but not for reparation.[101] The Czech Republic favours a strengthened regime of assurances and guarantees at least in the case of "crimes": "the possibility of obtaining appropriate assurances or guarantees of non-repetition from the State committing the 'crime' should be, systematically and unconditionally, de jure, whereas in the case of 'delicts' the securing of such assurances or guarantees would remain subject to an assessment based on the circumstances of the case."[102] In a similar vein, Uzbekistan suggests that "article 46 should stipulate what form of assurances the injured State is entitled to obtain."[103] By contrast, Germany questions the existence under customary international law of a right of an injured State to obtain guarantees of non-repetition in all cases.[104]

57. Although article 46 has not attracted much comment by States or in the literature, it raises a number of different issues. The first of these relates to the status of assurances and guarantees of non-repetition in the context of international responsibility. The commentary treats them as a sui generis remedy, but the account it gives strongly suggests that they are cognate to cessation rather than an aspect of reparation. Both cessation and assurances of non-repetition are concerned with the restoration of confidence in a continuing relationship, although assurances and guarantees are not limited to continuing wrongful acts and entail much greater elements of flexibility.

58. This element of flexibility is reflected in article 46 by the qualifying phrase "where appropriate". But this raises a second question, viz., whether article 46 can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable to countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely. If, despite earlier assurances, there is a repetition of the breach, this may be treated as a circumstance of aggravation, but that could be true in any event. There may thus be a case for expressing article 46 in more flexible terms.

59. Thirdly, there must be serious doubt as to whether any form of words could give much guidance in advance of the assurances or guarantees appropriate in any given case. Therefore, much must depend on the precise circumstances, including the nature of the obligation and of the breach.[105] On balance, however, it is proposed that a modest version of article 46 be inserted in chapter I of Part Two as a general principle associated with the continuation of the legal relationship affected by the breach.[106]

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[101] A/C.6/54/SR.21, para. 26.

[102] A/CN.4/488, p. 114.

[103] Ibid., p. 115.

[104] Ibid., p. 104.

[105] Cf. the extensive and very specific assurances and guarantees demanded or imposed by the Security Council in the aftermath of the Iraqi invasion of Kuwait: see e.g. resolutions 664 (1990), 686 (1991), 687 (1991).

[106] For the formulation proposed see below, para. 119.

4. Other legal consequences under customary international law

60. Article 38 provides that:

> "The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part."

This implies that there are other unspecified legal consequences of an internationally wrongful act (apart from those provided for in any applicable *lex specialis*). The question is what they might be. Of course one consequence of an internationally wrongful act might be the termination of the obligation violated, e.g., in case of a "material breach" of a bilateral treaty pursuant to article 60 (1) of the Vienna Convention on the Law of Treaties. But this has nothing to do with responsibility, and there is no need for any additional savings clause in this respect.

61. The brief commentary warns that Part Two "may well not be exhaustive as to the legal consequences of internationally wrongful acts".[107] But the only two examples it gives relate to the validity or termination of treaties. These examples are, first, the invalidity of a treaty procured by an unlawful use of force (Vienna Convention, article 53) and, secondly, the exclusion of reliance on fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party (Vienna Convention, article 62 (2) (b)). The commentary notes that "[t]hese types of legal consequences will not be dealt with in part 2".[108] The reason is that they are not consequences within the field of the draft articles at all.

62. As far as Government comments are concerned, Japan finds the reference to the rules of customary international law rather ambiguous. In its view, it is not clear whether these words are intended to deal with the relationship between State responsibility and other legal consequences in the field of the law of treaties, or between the draft articles and customary international law. In the latter case, Japan questions the relevance of the phrase, given that the draft articles are themselves aimed at codifying the customary rules of international law on State responsibility. In its view, the Commission should specify the customary rules envisaged in the provision.[109] France outlines the conceptual link existing between articles 37, 38 and 39, which "deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text."[110] Accordingly, it suggests that these three articles be included in the final or introductory provisions of the draft articles.

63. As to articles 37 and 39, the Special Rapporteur agrees with the remarks of the French Government, and proposes that they be transferred to a general concluding section.[111] As to article 38, the position is less clear. The reason articles 37 and 39 should apply to the draft as a whole is that they are equally relevant to Part One. This is not true of article 38, which is specifically concerned with the consequences of an internationally wrongful act and therefore with Part Two. Thus the doubt raised by Japan takes on additional significance. One possibility is that the principle

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[107] Commentary to article 38 [3], para. (3), *supra*, footnote 29, p. 43.
[108] Ibid, para. (1).
[109] A/CN.4/492, p. 13.
[110] A/CN.4/488, p. 94.
[111] See above, para. 8.

of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in a given case, which would not be specific or explicit enough to be covered by the *lex specialis* exception.

64. A possible candidate is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in the advisory opinion concerning *Hearing of Petitioners*. He said:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it."[112]

In the Case concerning the Gabcikovo-Nagymaros Project, the International Court held that:

> "It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of 'approximate application' because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question."[113]

That "cardinal condition" was not met, in the Court's view, in the circumstances of that case. Moreover, its treatment of the question suggests that this is less an autonomous principle of law than a conclusion generated, within the field of the performance of treaties, by the general principle of law that a State may not rely on the consequences of its own unlawful conduct. As such, and because of its specific character as a guide to interpretation, there is no need to include it in the draft articles, and accordingly no need to determine its scope of application. But it is an illustration of the capacity of general principles of international law to generate consequences in the field of the performance of legal obligations.

65. Within the field of State responsibility, there do not seem to be any other *general* legal consequences of the commission of an internationally wrongful act than those referred to in present Part Two — viz., cessation, restitution, compensation, satisfaction and the possible liability to countermeasures in the event that a State fails to comply with these secondary obligations. Moreover, it is slightly odd in a text which purports to specify the legal consequences of an internationally wrongful act to reserve a range of unspecified additional legal consequences, especially when no precise example can be given. It is true that no set of draft articles, in whatever form they may eventually be adopted, can freeze the law, and there is a standing possibility of new rules of international law in this field. But this point can be made in the commentary, and the *lex specialis* principle will also apply. On balance there is no strong case for the retention of article 38. If it is to be retained, it is not clear why it should be limited to the rules of customary international law. Rules of international law deriving from other sources might also

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[112] *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, separate opinion of Sir Hersch Lauterpacht, *I.C.J. Reports, 1956*, p. 46. For discussion of this passage see S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985) pp. 96-101.

[113] *I.C.J. Reports, 1997*, p. 7 at p. 53 (para. 76).

be relevant. The Special Rapporteur proposes below a reformulation of article 38, which is placed in square brackets to reflect his doubts as to its usefulness.[114]

5. The injured State

(a) Article 40: Meaning of "injured State"

The preparatory work

66. Part One of the draft articles as adopted on first reading did not use the term "injured State". The concept was, however, frequently referred to in the commentary, and it was understood that it would be necessary further on in the text to identify the State or States which, because they were injured by the breach, would be entitled to invoke responsibility.[115]

67. The first attempt to formulate the notion was made by Mr. Riphagen in 1984, and took the form of a definition. In support of his approach, he explained that:

> "since the whole of part 2 was supposed to deal with new rights and obligations arising between States as a consequence of an internationally wrongful act committed by one of them, a determination of which State (or States) was (or were) to be considered as the 'injured State(s)' should appear at the outset."[116]

His proposal came after an extensive debate on the notion of injured State held within the Commission in preceding years.[117] Excluding the existence of an "international law of tort", the Special Rapporteur had argued that in most cases, the determination of the injured State would not create any particular difficulty. Problems could arise, however,

> "when a primary rule of international law is clearly established for the protection of extra-State interests, and where a secondary rule of international law permits or even obliges other States to participate, actively or passively, in the enforcement of a primary rule".[118]

68. Members of the Commission were rather divided on a number of the underlying issues, particularly with regard to the position of States in case of an international crime in the sense of article 19. No one actually opposed the inclusion

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[114] For the formulation proposed see below, para. 119.

[115] See e.g. commentary to article 1, para. (5) et seq, in *supra*, footnote 55, pp. 174-176. Article 33 (1) (b) as adopted on first reading used the phrase "the State towards which the obligation existed" (implying a purely bilateral approach): see Second Report, A/CN.4/498/Add.2, para. 290.

[116] *ILC Report, Yearbook ... 1984*, vol. II (Part Two), pp. 101-102, para. 355. The following year, Mr. Riphagen renewed his proposition in the form of article 5 of Part II of the draft articles, together with a commentary thereto (see *Sixth Report ..., Yearbook ... 1985*, vol. II (Part One), pp. 5-8).

[117] See Riphagen, Third Report, *Yearbook ... 1982*, vol. II (Part One), pp. 36-39, paras. 90-101, and Fourth Report, *Yearbook ... 1983*, vol. II (Part One), esp. pp. 13-15, paras. 72-78 (where a distinction is drawn between the State having an interest affected and the State "party to the breach"), and pp. 21-23, paras. 112-125 (where the general distinctions and the rights an injured State is entitled to invoke in the different situations are listed). For the debates on the matter before the drafting proposal, see *Yearbook ... 1982*, vol. I, pp. 230-236 (1736th meeting), and *Yearbook ... 1983*, vol. I (1772nd, 1777th and 1780th meetings).

[118] Riphagen, Fourth Report, *Yearbook ... 1983*, vol. II (Part One), p. 21, para. 114.

of a provision dealing with the notion of the "injured State". As to its formulation, however, there was a range of views. Some members of the Commission endorsed the rather detailed approach proposed by the Special Rapporteur, while others suggested either "a general formula flexible enough to cover all cases"[119] or, on the contrary, a more refined provision, drawing a distinction "between directly affected States and other States, particularly in view of the entitlement of those States individually to invoke the legal consequences indicated in the articles that followed".[120]

69. In 1985, the Commission provisionally adopted article 5 of Part Two with commentary. The drafting followed the structure of the provision proposed by the Special Rapporteur, but with some modifications.[121] Most were of a rather minor character, but one substantial change raised criticism within the Commission. As one member put it:

> "[T]he Special Rapporteur's original language, defining an 'injured State' in terms of the breach of an obligation by the author State, had been replaced by a less satisfactory formulation in terms of the infringement of a right. In normal circumstances, the breach of an obligation by one State involved an infringement of the right of another State, but that was not always the case."[122]

70. Despite the level of detail adopted in what is the longest article of the entire text, article 5 was not intended to be exhaustive. Introducing the provision in the plenary, the Chairman of the Drafting Committee pointed out that:

> "The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2, and dealt with the rather special case of international crimes in paragraph 3."[123]

71. In the course of the debate, questions were raised as to the approach of the proposed article, and from a range of viewpoints. Sir Ian Sinclair was unconvinced "that the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal interest in the matter".[124] Mr. Ushakov expressed similar concerns, even with respect to international crimes: he did not share the view "that an international crime necessarily injured all States within the international community, since some of them would be injured directly, while others would not. Indeed, in some instances, no State was actually injured; it was rather the

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[119] ILC report, *Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 367. The point was, for example, lucidly made by Mr. Balanda:
"Rather than consider each and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State." (*Yearbook ... 1984*, vol. I, pp. 315-16 (1867th meeting)).

[120] *ILC Report, Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 367.

[121] See ILC report, *Yearbook ... 1985*, vol. II (Part Two), pp. 25-27. In 1996, that provision was adopted on first reading by the Commission as article 40 (ILC Report 1996, *Official Records of the General Assembly, Fifty-first Year, Supplement No. 10* (A/51/10, p. 140).

[122] Sir Ian Sinclair, 1929th meeting, *Yearbook ... 1985*, vol. I, p. 311.

[123] Mr. Calero Rodrigues, 1929th meeting, *Yearbook ... 1985*, vol. I, p. 308.

[124] 1777th meeting, *Yearbook ... 1983*, vol. I, p. 130; see also 1865th meeting, pp. 303-304. Mr. Malek agreed: ibid., p. 310.

international community of States as such that was affected".[125] Since one of his examples was the case of aggression, he must have been talking about States other than the primary target. Obviously for every act of aggression there is a victim State; indeed it was the possible disparity between the interests of the victim State and those of third States which Sir Ian Sinclair had noted.[126] Questions were also raised as to the permissible range of responses where all or many States were deemed "injured" by the breach of a multilateral obligation. According to Mr. Lacleta-Muñoz, "[w]hen the internationally wrongful act affected the collective interests of all the States parties, the response should be collective. Moreover, the article should indicate what those collective interests were".[127] The Special Rapporteur's defence of his proposal was rather indirect. Article 5 was, in his view, "a key article", which could not be a simple reference to primary rules outside the draft, given the need for precision.[128] On the other hand, "article 5 (e), by referring to 'all other States' as injured States in connection with international crimes, did not mean that all those States were injured to the same degree or that each of them could take any action it saw fit."[129] The point was echoed by the Chairman of the Drafting Committee, who noted that:

> "The Drafting Committee had considered the question whether, in the case of an international crime, all injured States should have the same right of response, or whether the response should be graduated according to the seriousness of the infringement of the right or interest in each case. It had been thought that, if that question was to be dealt with, the proper place to do so would be in the articles defining the legal consequences of international crimes."[130]

But the Commission did not return to the issue in drafting articles 51 to 53. Moreover, the question arises more generally with respect to breaches where all or many States are deemed "injured", whether or not they are classified as "international crimes".

72. On other points, Paul Reuter queried the distinction drawn in the text between injuries based on treaty and on general international law: "if ... some legal rules created subjective rights, would it not be advisable to draft a paragraph to that effect which did not distinguish between customary and written rules?"[131] One member even cast doubt on the basic assumption of article 40 that some injuries could be shared by all or many States. Mr. Ushakov, speaking against paragraph 3, noted that "[r]ights and obligations *erga omnes* certainly existed in general international law, but relations between States were, in the last analysis, always of a bilateral nature".[132]

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125 1861st meeting, *Yearbook ... 1984*, vol. I, p. 277.

126 He made the point again in the debate on the Drafting Committee's proposed article 5: 1930th meeting, ibid., p. 311; see also Mr. Roukounas, ibid., p. 312, and *contra*, Mr. Flitan, ibid., p. 313.

127 1867th meeting, *Yearbook ... 1984*, vol. I, p. 316.

128 1929th meeting, *Yearbook ... 1985*, vol. I, p. 317.

129 Ibid.

130 Mr. Calero Rodrigues, 1929th meeting, *Yearbook ... 1985*, vol. I, p. 309.

131 1861st meeting, *Yearbook ... 1984*, vol. I, p. 278.

132 1929th meeting, *Yearbook ... 1985*, vol. I, p. 310. The remark is significant, given the importance of Soviet doctrine in relation to article 19.

Article 40 and its commentary

73. As adopted on first reading, article 40 provides as follows:

"*Article 40. Meaning of injured State*

"1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

"2. In particular, 'injured State' means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

"3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime, all other States."

74. The commentary to article 40[133] notes that the question which State is responsible for an internationally wrongful act is answered in principle by Part One of the draft articles, which defines an internationally wrongful act

[133] Adopted in 1985 (see *Yearbook ... 1985*, vol. II (Part Two) pp. 25-27), the commentary to article 40 [5] was not reviewed when the draft articles were adopted on first reading in 1996. The only change was a footnote to paragraph (3), noting that:

"solely in terms of obligations, not of rights. This was done on the assumption that to each and every obligation corresponds *per definitionem* a right of at least one other State."[134]

Likewise, in his Second Report, Ago had postulated that there was always "a correlation between a legal obligation, on the one hand, and a subjective right, on the other". According to this view, it was "perfectly legitimate in international law to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective right of others".[135] This "exact" equivalence is expressed in a few crucial words in article 40 (1).[136] Thereafter Part Two of the draft articles speaks of the rights of "the" injured State, rather than the obligations of the State responsible for internationally wrongful conduct (hereafter referred to as the responsible State).

75. Article 40 thus operates as the hinge of the entire draft, the connecting element between the treatment of obligations in Part One and the treatment of rights in Part Two. Paragraph 1 having announced the exact correlation of obligations and rights, paragraph 2 then goes on to identify, in a non-exclusive way, cases where a State or States may be considered to have a right which is the correlative of an obligation breached. These cases vary from the dyadic right-duty relationship of a bilateral treaty or a judgement of an international court, to cases where the right arises under a rule of general international law or a multilateral treaty and all or many of the States bound by the rule or party to the treaty may be considered "injured". It also stipulates that in the case of "international crimes", *all* other States are injured and have a right to act.

76. As the commentary makes clear, the long and awkward catalogue in paragraph 2 is presumptive only. A particular treaty or rule may itself stipulate the entities (States or other persons) entitled to invoke responsibility for breach, on either an inclusive or an exclusive basis. In accordance with the *lex specialis* principle, such a stipulation will prevail.[137] But it is uncommon for a multilateral treaty to provide its own set of standing rules, and even less common for rules of general international law to do so. In most cases, the identification of the "injured State" in article 40 will govern by default.

Comments of Governments on article 40

77. Article 40 has attracted numerous comments by Governments. They express detailed and diverse opinions, but none questions the need for a provision in the draft articles dealing with the notion of injured States. Singapore, for example, describes the process of identifying the injured State as "vital in the allocation of certain privileges [and] to legitimizing subsequent acts which would otherwise be

"The term 'crime' is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as 'an internationally wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term."

[134] Commentary to article 40 [5], para. (2), ibid., p. 25.

[135] Ago, Second Report, *Yearbook ... 1970*, vol. II (Part One), p. 192.

[136] Curiously, however, article 40 (1) with its use of the conditional "if" apparently contemplates that an act which infringes the right of a State might not be wrongful. This might simply be a drafting lapse, or it might have been intended to cover cases where a right is infringed but the wrongfulness of the act is precluded under Part One, chapter V.

[137] Commentary to article 40 [5], paras. (5)-(6), in *supra*, footnote 133, p. 26.

wrongful".[138] Several Governments express the concern that the consequences of an internationally wrongful act are too broadly available. According to Austria, for example, the concept embodied in article 40 "has merits to the extent to which States are directly affected in their rights by violations of international law".[139] These doubts lead some Governments to question whether the element of actual loss or damage should not be the main requirement in the definition of an injured State. Consistently with its approach to article 1 of the draft, France considers that article 40 should "make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State", but does not reject the idea "that a State can suffer legal injury solely as a result of a breach of a commitment made to it" if the injury is "of a special nature".[140] Other Governments strongly oppose that view, on the assumption that the non-inclusion of damage as an element of a wrongful act does not entitle all States to invoke the responsibility of the wrongdoing State. On the contrary, "only the State or States whose subjective right has been injured may do so, i.e., those in respect of which an obligation has been breached".[141] Although in a slightly different form, that issue reappears as an important point in the discussion of paragraphs 2 and 3 of article 40, which have been subject to much comment and criticism.

78. It is true that some States support the general approach taken by the Commission on first reading. Germany, for example, points out that "the nature of the 'primary' rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States 'injured' by the breach of an obligation under such 'primary' rules."[142] But the majority of Governments commenting on draft article 40 express serious concerns as to the wording and content of paragraph 2 (e) and (f), and paragraph 3. A first issue relates to the "absurd results" to which these provisions could lead if they were to establish "a competitive or cumulative competence of States to invoke legal consequences of a violation".[143] Support has thus been given to the proposed distinction[144] between States specifically injured by an internationally wrongful act and States having a legal interest in the performance of the obligation.[145] The former would have the

[138] A/CN.4/488/Add.3, p. 2; see also A/CN.4/496, p. 19 (para. 122) and A/CN.4/488, p. 98 (the United Kingdom having "no comment on the greater part of draft article 40"). Uzbekistan suggests that the provision be transferred to Part Two, chap. II (ibid., p. 97).

[139] A/CN.4/488, p. 96. Thus Austria wonders whether the concept of injured State is workable where there is no directly affected State (referring, *inter alia*, to human rights violations).

[140] Ibid. France accordingly proposes another formulation for article 40: see ibid., p. 101. In a similar vein, Japan finds it "more appropriate that an injured State suffering no tangible damage to its interests is, in principle, entitled only to request the wrongdoing State to cease its internationally wrongful act" (A/CN.4/492, p. 13). See A/C.6/54/SR.23, para. 67 (Bulgaria) and A/C.6/54/SR.26, para. 42 (Burkina Faso) (the latter suggesting that the definition should also include the element of causality between the injury and the act). See also A/CN.4/504, para. 62.

[141] Italy (A/CN.4/488/Add.2, p. 3); see also A/C.6/54/SR.23, para. 54 (Venezuela) and A/CN.4/504, para. 62.

[142] A/CN.4/488, p. 97. See also Italy, which endorses the conceptions reflected in article 40 (A/CN.4/488/Add.2, p. 3).

[143] Austria (A/CN.4/488, p. 97). For the United States, these provisions reflect "unacceptable and over-broad conceptions of injury" (ibid., p. 99).

[144] See ILC report 1999, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10*, (A/54/10), p. 10, para. 29.

[145] See A/CN.4/504, para. 64. The distinction has, however, been criticized as serving no useful purpose given the uncertainty of the concept of States having a legal interest; see A/C.6/54/SR.22, para. 4 (Denmark, on behalf of the Nordic countries).

right to seek reparation in their own right, whereas the latter could only claim the cessation of the wrongful conduct and for reparation to be made to the specifically injured State.[146] Moreover, in the opinion of the United Kingdom, the Commission should consider whether "the right of States to consider themselves injured ... should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the 'breach'".[147]

79. A number of other issues have been raised in respect of paragraph 2 (e) and (f). They can be summarized as follows:

- The combined reference to multilateral treaties and customary international law seems problematic. For some Governments, it would be preferable to deal with the two sources in separate provisions;[148] for others, mention should also be made either of bilateral custom or obligations arising from unilateral acts.[149]

- As to paragraph 2 (e) (ii), several Governments are concerned by its inconsistency or "possible overlap ... with article 60 of the Vienna Convention on the Law of Treaties",[150] the provisions of which appear "narrower".[151] Hence the United Kingdom strongly favours the approach embodied in article 60 of the Vienna Convention which, compared to the vague criterion in article 40, "has the effect of limiting the concept of the injured State to those States that are materially affected".[152] More broadly, some Governments point out that the standing of injured States in case of breach of a multilateral treaty obligation should first be governed by the treaty itself and, as appropriate, by the law of treaties.[153]

- As to paragraph 2 (e) (iii), some Governments call for a clarification, dealing especially with the invocation of reparation by States parties that have not been actually harmed by the breach.[154]

- As to paragraph 2 (f), France deems it "completely inappropriate to allow States to so intervene in situations which are not of direct concern to them",[155] while other Governments consider that a clarification of the terms "collective interests", or of the kind of treaties covered, is needed.[156]

80. As far as paragraph 3 is concerned, Governments have expressed differing views. Some are of the opinion that, in the case of crimes also, different categories

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[146] Ibid. See also Austria (A/CN.4/488, p. 97).

[147] A/CN.4/488, p. 99.

[148] A/CN.4/496, p. 19. Singapore considers it a condition for invocation of responsibility under customary international law that there exist a "sufficient nexus between the violator and the State claiming status as an injured State" (A/CN.4/488/Add.3, pp. 3-5).

[149] A/CN.4/504, para. 66. There was also support for an illustrative rather than exhaustive list: ibid.

[150] Germany (A/CN.4/488, p. 98).

[151] United Kingdom (A/CN.4/488, p. 98).

[152] Ibid., pp. 98-99. See also the proposition of the United States: ibid., pp. 99-100.

[153] United States (ibid., p. 99); see also A/C.6/54/SR.23, para. 58 (Israel).

[154] United States (A/CN.4/488, p. 100), Japan (A/CN.4/492, p. 13); see also A/C.6/54/SR.23, para. 41 (Australia, suggesting that reparation in such cases be limited to assurances and guarantees of non-repetition).

[155] A/CN.4/488, p. 98.

[156] United States (ibid., p. 100), Japan (A/CN.4/492, p. 13); see also A/C.6/54/SR.23, para. 42 (Australia).

of injured States should be made, "leading to different 'rights of injured States'".[157] Thus the United States is concerned by the "disruptive results" to which paragraph 3 could lead. In its opinion, the fact that States are all individually rather than collectively injured by a crime in the meaning of article 19, could give rise to "multiple claims of reparation [and] result in inadequate compensation for those States that can indeed identify injury".[158] Other Governments, however, support the approach taken by the Commission on first reading and consider in particular that, when a crime in the sense of article 19 is committed, every State is injured and can invoke the responsibility of the wrongdoing State.[159] Switzerland makes the helpful point that, "to the extent that the concept of 'crime' overlaps with a violation of the peremptory norms of international law", all States can be considered as injured, notwithstanding the qualification of the wrongful act as a crime; accordingly, the criminalization of certain types of conduct is unnecessary "in order to attach especially severe consequences" to them.[160]

81. Many of these criticisms of article 40 are echoed in the literature.[161]

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[157] Germany, distinguishing between the right to call for cessation and resumed performance of the obligation on the one hand, and the right to claim reparation on the other hand (A/CN.4/488, p. 101); see also A/CN.4/496, para. 123 (referring as a criterion for the distinction to the "proximity of a State to the breach").

[158] A/CN.4/488, p. 102. The United States nonetheless points out that, even if a State is principally affected, "widespread injuries might be suffered by a number of States" (ibid.).

[159] See A/CN.4/488/Add.2, p. 3 (Italy) and A/CN.4/504, para. 65. For the Czech Republic, paragraph 3 "is certainly not insignificant, and it has important consequences in terms of both reparation and countermeasures" (A/CN.4/488, p. 100).

[160] A/CN.4/488, p. 101.

[161] See e.g. K. Sachariew, "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status" (1988) 35 *NILR* 273; D. N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties" (1988) 59 *BYIL* 151; K. Kawasaki, "The Notion of 'Injured State' in the Law of International Responsibility of States: The ILC's Draft Article 5 of Part Two on State Responsibility (3 parts)", *Shudo Law Review*, vol. 11, 1989, pp. 319-353; vol. 12, 1990, pp. 95-120; vol. 13, 1991, pp. 225-262 (in Japanese); B. Simma, "Bilateralism and Community Interest in the Law of State Responsibility", in Y. Dinstein (ed.), *International Law at the Time of Perplexity* (Dordrecht: Martinus Nijhoff, 1989) 821; J. Charney, "Third State Remedies in International Law", 10 *Michigan JIL* (1989) 57; V. Vadapalas, "L'intérêt pour agir en responsabilité internationale" (1993) 20 *Polish YBIL* 17; J. A. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law", 248 *Recueil des cours* (1994/IV) p. 349; B. Simma, "From Bilateralism to Community Interest in International Law" (1994/VI) 250 *Recueil des cours* 219; C. Annacker, "Part Two of the International Law Commission's Draft Articles on State Responsibility", *German Yearbook of International Law*, vol. 37, 1994, 206; A. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer, The Hague, 1996); G. Perrin, "La détermination de l'Etat lésé. Les régimes dissociables et les régimes indissociables", *in Essays in Honour of Krzysztof Skubiszewski*, Kluwer, The Hague, 1996, pp. 243-249; M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Clarendon Press, Oxford, 1997); D. J. Bederman, "Article 40 (2) (e) & (f) of the ILC Draft Articles on State Responsibility: Standing of Injured States under Customary International Law and Multilateral Treaties" (1998) 92 *ASIL Proceedings* 291; K. Kawasaki, "The 'Injured State' in the International Law of State Responsibility" (2000) 28 *Hitotsubashi J. Law & Politics* 17; J. Crawford, "The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility" (2000, in press).

(b) Some preliminary issues

82. Before turning to the possible ways in which these concerns may be resolved, it is necessary to analyse article 40 in more detail. Four issues may be mentioned.

The identification of legal interest and subjective right

83. An initial question is the identification for all purposes of responsibility with the subjective rights of an injured State or States. This was rooted in earlier theories of State responsibility (especially Anzilotti's), based on the paradigm of bilateral relations as characteristic of international law. At the time of his Second Report (issued in the same year as the Court's dictum in *Barcelona Traction*), Special Rapporteur Ago had only just begun to formulate the idea of responsibility to the international community as a whole. For this purpose it matters little whether we use the language of article 19 ("international crimes") or that of the Court itself when it referred to an obligation held towards the international community as a whole (*erga omnes*).[162] In either case, there is a problem in the immediate identification of that responsibility with the "subjective" rights of particular States.

84. The term "subjective" may be used here only to make the point that the "secondary" legal relations arising from a breach of an international obligation are, necessarily, legal relations between the author of the breach and other persons or entities. There is no such thing as "responsibility in the air"; responsibility is always responsibility to persons, and is in that sense "subjective".[163] But this does not mean that obligations of a collective or communitarian character are reduced forthwith to bilateral relations. In discussing the strict correlation between obligation and rights, implicit reliance was laid on the work of W. N. Hohfeld and his "jural correlatives".[164] But Hohfeld stressed the variety of legal relations, and was certainly not concerned to reduce legal relations to a single form. In the field of international relations there is no longer (if there ever was) any a priori reason to reduce all relations of responsibility to the form of a bilateral right-duty relation of two States, as under a bilateral treaty.

85. For example, Ethiopia and Liberia were not themselves the beneficiaries of the obligation they invoked in the *Second South West Africa* cases.[165] The beneficiaries were the people of South West Africa itself; it was their "subjective" right to have the Territory administered on their behalf and in their interest which was at stake.[166]

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[162] For the reasons given in his First Report, the Special Rapporteur prefers the use of the Court's terminology of obligations to the international community as a whole. This is certainly the case in the context of article 40, which is concerned with the right to invoke responsibility rather than for the consequences of doing so: see First Report, A/CN.4/490/Add.3, para. 98.

[163] In the Special Rapporteur's view, the possible confusion between a very unusual sense of the term "subjective" and its more usual sense is a sufficient reason for avoiding it altogether. In its ordinary sense, there can be no "non-subjective" obligation or right; the term is therefore unnecessary as well as potentially misleading. See Second Report, A/CN.4/498, para. 6, and to similar effect, de Hoogh, *Obligations Erga Omnes and International Crimes*, p. 20.

[164] See W. N. Hohfeld, *Fundamental Legal Conceptions* (Yale UP, New Haven, 1923, reprinted in 1964).

[165] *I.C.J. Reports*, 1966, p. 6.

[166] In the *Namibia Opinion*, *I.C.J. Reports, 1971*, p. 16 at p. 56 (para. 127), the Court emphasized that in the case of South West Africa "the injured entity is a people", and not a State or group of States. Cf. Riphagen, Preliminary Report, *Yearbook ... 1980*, vol. II, Part One, p. 118 (paras. 56-57).

Ethiopia and Liberia claimed an adjectival or procedural right, to seek to ensure that South Africa complied with its obligations to the people of the Territory. There is no analytical reason for disallowing such a legal relation,[167] and Hohfeld would have had no difficulty in fitting it into his scheme.[168] A legal system which seeks to reduce the legal relations between South Africa, the people of the Territory and the two applicant States to a bilateral form is deficient. Yet this is what article 40 appears to do, with its "exact" equivalents.[169]

The treatment of human rights obligations

86. A second question involves the treatment of human rights obligations. Under article 40 (2) (e) (iii), every State bound by a human rights obligation is injured by its breach.[170] Indeed, on the face of it every State is considered as injured even by an individual and comparatively minor breach of the fundamental right of one person (not its national). According to the commentary, "it is clear that not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered as incompatible with the respect of such rights ... must necessarily be qualified as giving rise to the application of the present provision".[171] But this protestation is not reflected in the text of paragraph (2) (e) (iii). Nor is any attempt made (e.g., by reference to the notion of systematic or gross breaches) to distinguish between cases where all States are injured and those where the individual beneficiary of the human right is injured and States parties to the human rights obligation have a general interest in compliance.

87. Even in the case of well-attested, gross or systematic violations of human rights, it is suggested that a distinction should still be drawn between the rights of the victims and the responses of States. Otherwise the effect of article 40 (2) (e) (iii) is to translate human rights into States' rights, and this seems no more justified when one is dealing with systematic violations than with individual ones. It may be that third States are considered as having more extensive rights to intervene or to

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[167] A narrow majority of the Court in 1966 held that the applicant States had no individual legal interests in the due administration of the Mandate, which they could vindicate under the compromissory clause. But the "majority" did not deny that the Mandate *could* have recognized the right of all States Members of the League to enforce the obligations of the mandatory by proceedings before the Court: see, e.g., *I.C.J. Reports, 1996*, p. 6, at p. 23 (para. 16). The result was reached by restrictive interpretation of the compromissory clause. In any event the decision was strongly criticized and must now be read in the light of the Court's dictum in the *Barcelona Traction* case, *I.C.J. Reports, 1970*, p. 3 at pp. 32-33.

[168] There are certainly cases (e.g., articles 45 and 48 of the European Convention on Human Rights, 1950; or the successor provision, article 33 of the Eleventh Protocol, 1994) in which such a general interest has been recognized, without equating the rights of the States taking action to the substantive rights they are seeking to protect.

[169] In *Barcelona Traction* itself, the Court noted that "Responsibility is the necessary corollary of a right" (*I.C.J. Reports, 1970*, p. 3 at p. 33 (para. 36)). But it did so after first drawing a distinction between the rights of States vis-à-vis other States (e.g., in the field of diplomatic protection) and obligations *erga omnes* which all States have a "legal interest" in protecting. It was not saying that the only cases of responsibility were cases where a State's individual rights are infringed.

[170] As drafted, para. (e) (iii) applies to any "right ... created or ... established for the protection of human rights and fundamental freedoms". It is odd to speak about a right established for the protection of a right: though this seems to be merely a drafting problem, it raises further doubts as to the scope of the subparagraph.

[171] Commentary to article 40 [5], para. (22), in *supra*, footnote 133, p. 27.

respond to systematic breaches of human rights than they might have in cases of individual breach, though the International Covenants of 1966 do not say so.[172] But even if the rights of third States are more extensive, they do not seem to change in character. The States concerned may be representing the victims, but they are not to be identified with them, and they do not become the right-holders because they are recognized as having a legal interest in the author State's compliance with its human rights obligations.

88. Paragraph (2) (e) (iii) also raises the question why human rights are singled out as a category for special treatment. According to the commentary:

> "The interests protected by [human rights] provisions are not allocatable to a particular State. Hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State."[173]

But just because human rights obligations under multilateral treaties or general international law are not "allocatable" or owed to any particular State does not make it necessary that all States concerned should be considered as obligees, and certainly not "in the first instance". Moreover, human rights obligations are not the only class of international obligations whose performance cannot be considered as affecting any "particular State" considered alone. This is also true of some obligations in such fields as human development, world heritage and environmental protection, which could also have been mentioned in article 40.

89. What does seem to be special about human rights obligations (as compared with these other fields) is that they are specifically formulated in terms of the rights of individuals, whereas, for example, international environmental instruments speak of the obligations of States. By contrast, international law rules relating to the treatment of aliens in the field of diplomatic protection were deliberately articulated as involving the rights of States, as the Permanent Court stressed in *Mavrommatis Palestine Concessions*.[174] The use of the language of human rights in the Charter of the United Nations and in human rights texts since 1948 has involved a considered and consistent change in terminology. It must have legal significance. But it provides no reason for treating human rights obligations as "allocatable" to States "in the first instance".

Other cases of injury arising from multilateral legal relations

90. Apart from "international crimes", two other cases are given in article 40 of the recognition of multilateral rights. One case, not identified in article 40, also calls for consideration.

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[172] Different rules of admissibility apply to inter-State complaints of systematic violations of human rights than to individual ones: see e.g. the judgement of the European Court of Human Rights in *Ireland v. United Kingdom*, ECHR Series A, No. 25 (1978), p. 64 (para. 159).

[173] Commentary to article 40 [5], para. (20), in *supra*, footnote 133, p. 27.

[174] *PCIJ*, Series A, No. 2 (1924), p. 12. The same principle was affirmed by the International Court in *Reparations for Injuries suffered in the Service of the United Nations, I.C.J. Reports, 1949* p. 174 at pp. 181-182, and also in *Barcelona Traction (Second Phase) I.C.J. Reports, 1970*, p. 3 at pp. 32-33.

(a) Integral obligations

91. In accordance with article 40 (2) (e) (ii), every State party to a multilateral treaty, or bound by a rule of general international law, is injured by a breach of an "integral obligation".[175] This is defined as a breach which "necessarily affects the enjoyment of the rights or the performance of the obligations of" the other States parties. The commentary says little more than that the paragraph "deals with a situation of fact recognized as a special one also in the Vienna Convention on the Law of Treaties insofar as multilateral treaties are concerned (see, e.g., article 41, para. 1 (*b*) (i), article 58, para. 1 (*b*) (i), and, in a somewhat different context and wording, article 60, para. 2 (*c*))".[176] But of the three provisions of the Vienna Convention mentioned in the commentary,[177] only article 60 (2) (c) actually deals with questions which are cognate to responsibility.[178] Article 60 (2) (c) is concerned with any treaty which is "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". This is narrower than draft article 40 (2) (e) (ii). While applying an a priori test of effect upon other States, it applies to the treaty as a whole and not to the particular obligation breached. Probably this difference can be explained by the difference in context. The Vienna Convention is concerned with the treaty instrument as a whole, whereas the draft articles are concerned with particular obligations. Thus there seems to be no difficulty in transposing the notion of integral obligations to the law of State responsibility, and correspondingly no difficulty in treating each State as individually injured by a breach of an integral obligation.

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[175] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the law of treaties: see *Yearbook ... 1957*, vol. II, p. 54, and see also K. Sachariew, "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status" (1988) 35 *NILR* 273 at p. 281.

[176] Commentary to article 40 [5], para. (19), in *supra*, footnote 133, pp. 26-27.

[177] Article 41 (1) (b) is concerned with the modification *inter se* of a multilateral treaty by only some of its parties. Such a modification is permissible if it is not prohibited by the treaty and "does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations". The test of permissibility here depends on whether the particular modification in fact affects the position of the other parties to the convention. It is not an a priori test, and it is not limited to modifications which "necessarily affect" the other parties. Rather it extends to those modifications which in fact affect them in the particular case. There is no requirement that it affect *all* the other parties: a modification which affected some or perhaps any of them would be excluded. Article 58 (1) (b) is concerned with the suspension of operation of a multilateral treaty between only some of its parties: quite properly it applies the same test as does article 41 of the Vienna Convention for modifications *inter se*.

[178] Article 60 provides as follows:

"2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."

(b) Obligations erga omnes partes

92. In addition, article 40 (2) (f) defines as injured all other States parties to a multilateral treaty "if the right infringed ... has been expressly stipulated in that treaty for the protection of the collective interests of the States parties". These may be referred to as obligations *erga omnes partes*. They concern obligations in the performance of which all the States parties are recognized as having a common interest, over and above any individual interest that may exist in a given case. The commentary gives as an example "the concept of a 'common heritage of mankind', as recently accepted in respect of the mineral resources of the seabed and subsoil beyond national jurisdiction".[179] This suggests that the requirement of express stipulation is to be interpreted with some flexibility. Nonetheless, the commentary notes that "in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application", and it is textually limited in two ways, first to express stipulations, and second to such stipulations in multilateral treaties.[180] As to the first, there is a wide diversity of modern multilateral treaties concerned to vindicate collective interests, and to require an express stipulation seems too narrow. As to the second, the draft articles proceed on the basis that obligations under treaties and under general international law are to be treated as equivalent,[181] and it may well be the case that general international law parallels and reinforces a multilateral treaty provision in the public interest. Moreover, there is no reason to limit the category of "protection of collective interests" to the collective interests of States, narrowly conceived. Human rights treaties are plainly (even if not always explicitly) designed to protect a general common interest. Paragraph 2 (e) (iii) is therefore better regarded as cognate to article 2 (f).[182]

(c) Specially affected States

93. While recognizing the possibility that all States, or a broad group of States, may be legally interested in the performance of an obligation, article 40 (2) conspicuously fails to recognize the case of a State or States "specially affected" by a breach. In this respect it fails to follow the logic of article 60 (2) of the Vienna Convention. It would be odd if a State specially affected by a breach was entitled to suspend the underlying obligation but not to insist on its performance. Indeed the suspension of the obligation may actually be *convenient* so far as the State in breach is concerned. Even if it does not release that State from secondary obligations

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These provisions are subject to a contrary provision in the treaty itself (art. 60 (4)), and do not apply to certain cases such as humanitarian treaties which should be kept in full force irrespective of breaches (art. 60 (5)). The term "specially affected" is not defined, and the commentary to article 60 does not take matters further. See *Yearbook ... 1966* vol. II p. 255, para. (7). In the *Namibia Opinion* the Court expressed the view that article 60 was "in most respects" declaratory of existing international law: *I.C.J. Reports, 1971*, p. 16, at p. 47 (para. 94).

[179] Commentary to article 40 [5], para. (23), in *supra*, footnote 133, p. 27.

[180] Commentary to article 40 [5], para. (24), ibid. This is said, however, not to "exclude the development of customary rules of international law to the same effect": ibid., para. (25).

[181] See draft article 16 (as provisionally adopted on second reading, A/CN.4/L.574 and Corr.1-4); Crawford, Second Report, A/CN.4/498, paras. 16-26.

[182] As a general matter, human rights obligations are either obligations *erga omnes partes* or obligations *erga omnes*, depending on their universality and significance.

already accrued,[183] it will have the effect of releasing it from any obligation of cessation (so far as relations with the suspending State are concerned), and of any legal consequences of what would otherwise be a continuing wrongful act. Suspension of treaty relations is no substitute for an adequate regime of State responsibility.

Consequences of identifying multiple "injured States"

94. Under article 40, all "injured States" are apparently treated in exactly the same way. Each State injured by an internationally wrongful act is entitled to seek cessation and reparation[184] and to take countermeasures if cessation and reparation are not provided.[185] This may be appropriate where the "subjective" or individual rights of States are concerned. A State whose right has been breached is entitled to protest, to insist on restitution or (even where restitution may be possible) to decide that it would prefer compensation. It may insist on the vindication of its right or decide in the circumstances to overlook it and waive the breach. But the position where the obligation is a multilateral one may well be different. For example, the particular beneficiary of a substantive obligation (e.g., the individual whose right has been violated contrary to a human rights obligation, the people whose right to self-determination has been denied or even the State actually harmed by a breach of an obligation *erga omnes*) may validly prefer compensation to restitution. By what right could others, even with a recognized legal interest in compliance, countermand that preference?

95. Again there is a contrast with article 60 (2) of the Vienna Convention on the Law of Treaties, which is at pains to define the steps that "specially affected" or "integrally affected" States can take against the responsible State. These steps affect only the relations of the affected State vis-à-vis the responsible State, and allow only suspension of treaty relations. More drastic measures require the unanimous agreement of the other States parties.

Conclusion on article 40

96. As the present account shows, those aspects of article 40 which relate to multilateral obligations, including obligations *erga omnes*, have never been thoroughly considered. In particular, the Commission never returned to consider that definition in the light of the consequences dealt with further on in Part Two. In the Special Rapporteur's view, many of the criticisms of article 40, made by members during its drafting, by Governments since its adoption, as well as in the literature, are justified. Article 40 is defective in a number of respects:

- In its premature conversion from the language of obligation (the key concept in Part One) to the language of right;
- In its apparent assumption that all responsibility relations are to be assimilated to classical bilateral right-duty relations (an assumption contradicted by the International Court in the *Barcelona Traction* case), or alternatively in its

[183] Cf. Vienna Convention on the Law of Treaties, article 72 (1).

[184] See articles 41, 42.

[185] See article 47. The only (indirect) qualification is provided by article 48, with its requirement that countermeasures "shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".

failure to spell out the ways in which multilateral responsibility relations differ from bilateral ones;

- In the equation of all categories of injured State, with all apparently having the same independent rights;
- In particular, in its failure to distinguish between States "specially affected" by a breach of a multilateral obligation and States not so affected;[186]
- In its erratic treatment of multilateral obligations (for example, the unexplained distinction between treaty and non-treaty obligations, the unjustified assumption that regimes of common interest can only be created by multilateral treaties through express stipulations, and in singling out human rights for special treatment in vague and overly broad terms which conflict or overlap with other provisions of the definition);
- In the circuitous and prolix drafting of paragraph 2, which overshadows the basic point in paragraph 1.

As it stands, it is doubtful whether article 40 provides a suitable basis for the codification and progressive development of the legal consequences of State responsibility.

(c) Options for the reformulation of article 40

97. The primary statement in modern international law of the idea of legal injury and of standing to protest an injury is that of the International Court in the *Barcelona Traction* case. The Court there drew a distinction between rights arising in a bilateral context (that of diplomatic protection) and legal interests of the international community in respect of certain essential obligations. The crucial passage is as follows:

> "... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* ... Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, that all States have a legal interest in its observance. In order to bring a claim in respect of a breach of such an obligation, a State must first establish its right to do so ..."[187]

The distinction between individual rights of States and the legal interests of several or all States is drawn very clearly. Moreover, this "essential distinction" was not without significance for that case. Although Belgian nationals were the shareholders in the Canadian company (and to that extent Belgium might be thought "specially affected" by Spain's action), in the circumstances Spain owed an obligation only to Canada as the State of nationality of the corporation, and Belgium therefore had no

[186] Cf. Vienna Convention on the Law of Treaties, 1969, article 60 (2) (b).

[187] *I.C.J. Reports, 1970*, p. 3, at p. 32 (paras. 33-35).

right to invoke responsibility.[188] It can be inferred from this passage that, had an obligation *erga omnes* been involved, the result could have been different.

98. If there is an essential distinction for the purposes of State responsibility between breaches of bilateral obligations and breaches of multilateral obligations (in particular, obligations *erga omnes*), it is necessary to treat them separately in any discussion of article 40.

Article 40 and bilateral obligations

99. A bilateral international obligation is one to which there are only two parties (obligee and obligor). Now it is possible that one of those parties, the obligor, is not a State; it might be an international organization or some other "subject" of international law. Despite the general character of Part One, dealing with all obligations of States, Part Two does not deal with all the secondary rights and permissible responses of persons or groups which are not States. There is thus a discrepancy between the scope of Part One and of Part Two, but as noted above,[189] this is not a reason for limiting the scope of Part One. It may be, however, that a savings clause should be inserted in Part Two which adverts to the different scope of that Part and which avoids any inference that might be drawn, *a contrario*, from the detailed treatment of States as obligors in parts Two and Two *bis*. The following provision is suggested:

> "This [Part] is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue to any person or entity other than a State."

100. Turning to the case of the strictly bilateral obligation as between one State and another, the first point to be made is that bilateral obligations can arise from a variety of sources, including general international law, bilateral or multilateral treaties or unilateral acts. For example, it seems that the legal relations that arise from the Vienna Convention on Diplomatic Relations (and equivalent rules of general international law) are essentially bilateral in character. These provisions give rise to obligations between the particular sending State and the particular receiving State. The same is true of the general international law rules and standards of diplomatic protection, as the Court made clear in *Barcelona Traction*.

101. For the purposes of the draft articles, however, not merely is it unnecessary to specify in which cases particular multilateral treaties or rules of international law produce bilateral obligations; to do so would be inconsistent with the underlying distinction between primary and secondary obligations, on which the draft articles are founded. It is not the function of the draft articles to specify the form or content of individual primary obligations. Thus it is sufficient for present purposes to acknowledge the existence of both bilateral and multilateral obligations, leaving the application of that distinction to other forums.

102. On that basis the treatment of bilateral obligations is a relatively simple matter. In the case of such obligations:

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[188] The Court noted the existence of exceptional cases where a State other than the State of nationality would have the right: *I.C.J. Reports, 1970* at pp. 38-40. In such a case, Spain might have had parallel bilateral obligations to different States, each of which could exercise the "correlative rights of protection" individually.

[189] See above, para. 7.

(a) Only the State which is the obligor is "injured" by a breach;

(b) That State can validly consent to conduct which would otherwise be a breach,[190] or waive its consequences;

(c) That State can elect to receive compensation rather than restitution, or can be satisfied with assurances as to the future in lieu of any form of reparation;

(d) That State can take countermeasures in respect of the breach, subject to the general conditions for countermeasures set out in the draft articles.

103. As a matter of formulation, present article 40 (2) devotes no less than four paragraphs to situations which essentially involve bilateral obligations. These are set out in subparagraphs (a) to (d).[191] It is suggested that this catalogue is unnecessary and undesirable. It is not the function of the draft articles to say when a State is the (only) beneficiary or obligor of an international obligation, since this depends on the terms and interpretation of that obligation. All the "bilateral" situations dealt with in article 40 (2) can be subsumed in a simple formulation, which might read as follows:

> "For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if the obligation breached is owed to it [individually]."

The term "individually" evidently raises a question. On the one hand, it seems to be useful to distinguish the case of obligations owed collectively to a group of States or to the international community as a whole. On the other hand, this should not obscure the possibility that State A may at the same time owe the same obligation bilaterally (or more properly, an obligation with the same content) to one or many third States. For example, a receiving State may owe identical obligations to a large number of sending States in the field of diplomatic or consular immunities. But the possibility of parallel and identical bilateral obligations of one State towards others can be explained in the commentary; hence the term "individually" might well be retained.

104. It may be objected that all States have an interest of a general character in compliance with international law and in the continuation of institutions and arrangements (such as diplomatic immunity) which have been built up over the years. As the International Court said in the *Diplomatic and Consular Personnel* case, after referring to the "fundamentally unlawful character" of the conduct of the Islamic Republic of Iran in participating in the detention of the diplomatic and consular personnel:

> "In recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of

[190] See draft article 29 (as provisionally adopted on second reading, A/CN.4/L.574 and Corr.1-4); Crawford, Second Report, A/CN.4/498/Add. 2, paras. 230-241.

[191] See above, para. 73.

relations between its members should be constantly and scrupulously respected."[192]

Thus it can be argued that, even though particular obligations may be bilateral, the more general interest of States in compliance with international law should be recognized in some way. However, outside the field of "integral" obligations, or obligations *erga omnes partes*, as explained above, it is doubtful that States have a right or even a legally protected interest, for the purposes of State responsibility, in the legal relations of third States *inter se*.

105. No doubt there is room for some element of solidarity, even in purely bilateral contexts. In diplomatic practice it is not unusual for third States to take note of an evident breach and to remind the responsible State of their concerns. It seems, however, that this will not amount to the invocation of State responsibility by a third State, and that it does not need to be regulated in the draft articles. It should be sufficient for the commentary to reflect that the definition of "injured State" is concerned with the invocation of responsibility, and does not affect informal diplomatic exchanges with third States for the purpose of expressing concern and assisting in the resolution of conflicts.[193]

Article 40 and multilateral obligations

(a) Types of multilateral obligations

106. In delimiting the notion of "injured State" for the purposes of responsibility, the essential problem evidently concerns multilateral obligations. These are obligations owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole. Again it is not necessary to say which particular obligations are multilateral in this sense. It is sufficient to affirm that the category exists. But it may be helpful to acknowledge the existence of some further subcategories or types of multilateral obligations. Three cases may be distinguished:

(a) **Obligations to the international community as a whole (*erga omnes*).** The first is the case where an obligation is owed to the international community as a whole, with the consequence that all States in the world have a legal interest in compliance with the obligation. This is the obligation *erga omnes* referred to by the Court in *Barcelona Traction*.[194] From the Court's reference to the international community as a whole, and from the character of the examples it gave, one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g., in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as

[192] *I.C.J. Reports, 1980*, p. 3 at pp. 42-43 (para. 92).

[193] The phrase "informal diplomatic exchanges" is taken from article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965. The context there (though bilateral) is different: the State concerned, having waived its right of diplomatic protection under article 27 (1), nonetheless retains an interest in facilitating a resolution of the dispute. However, the language seems appropriate for the situation of third States also.

[194] See above, para. 97.

between two States, it is hard to see how that obligation is owed to the international community as a whole;

(b) **Obligations owed to all the parties to a particular regime (*erga omnes partes*)**. The second is the case of the international regime in the maintenance and implementation of which all the States parties have a common legal interest. It may be referred to as an obligation *erga omnes partes*. It includes, in particular, those obligations which are expressed (or necessarily implied) to relate to matters of the common interest of the parties.[195] Examples of such obligations arise in the fields of the environment (for example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear-free-zone treaty or a test-ban treaty). In such cases, although it is conceivable that one or a few States might be specially affected by a breach, this is unlikely, and is anyway without prejudice to the general interest in the subject matter which is shared by all the States parties collectively. As a matter of principle there is no reason to exclude from the scope of obligations *erga omnes partes* obligations arising under general international law.[196] Nor is there any reason to require that regimes created by multilateral treaty should recognize the collective interest in express terms. It is sufficient if they clearly do so as a matter of the interpretation of the provisions in question. Thus, for example, it would include obligations arising under a regional human rights treaty, where compliance is recognized as a legal interest of all the States parties.[197] This category includes the case referred to in draft article 40 (2) (e) (iii) as well as (f);

(c) **Obligations to which some or many States are parties, but in respect of which particular States or groups of States are recognized as legally interested**. In cases of multilateral obligations, whether or not they are held *erga omnes*, it may be that particular States or subgroups of States are recognized as having a specific legal interest in compliance. In the first place the existence of a legal interest would be a question of interpretation or application of the relevant primary rules. However, it seems a reasonable inference from article 60 (2) (b) to hold that a "State specially affected" by a breach of a multilateral obligation ought to be entitled to invoke the responsibility of the State concerned in respect of that breach.

It should be stressed again that these subcategories are not mutually exclusive in the following sense: One State may be directly and specifically affected by the breach of an obligation *erga omnes* (e.g., the victim of an unlawful armed attack) or of an obligation *erga omnes partes* (e.g., the State whose vessel is denied the right of transit through an international waterway). Thus it is possible for a State to be "injured" — for its legal interests to be affected — in a number of different ways in respect of the same breach.

107. Thus the schema shown in table 1 below would reflect the position for the purposes of article 40 or its equivalent. The schema does not take into account the concept sought to be reflected in article 19, a concept which could be paraphrased as that of

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[195] Integral obligations as defined in article 60 (2) (c) are a subcategory of obligations *erga omnes partes*. In the case of an integral obligation any breach undermines the position of all the other States parties, to an extent that justifies treating each State party as individually injured.

[196] See above, para. 92.

[197] E.g., the right of transit through the Kiel Canal which was the subject of dispute in *The Wimbledon*, *P.C.I.J.*, Series A. No. 1 (1923).

an egregious breach of an obligation *erga omnes*. But for the purposes of article 40 or any equivalent, that concept is not necessary.[198] It is already the case that all States are entitled to invoke responsibility in respect of a breach of an obligation *erga omnes*, and *for this purpose* there is no need for the additional requirement that the breach be "gross", "systematic" or "egregious". The question whether any further such requirement is needed in terms of the *consequences* of responsibility, however, remains and will be discussed below.[199]

Table 1
States entitled to invoke responsibility in respect of multilateral obligations

Category of multilateral obligation	*States entitled to invoke responsibility*	*Extent of application*
Obligation *erga omnes*	All States	Applies to obligations *erga omnes* in the sense explained by the Court in *Barcelona Traction*
Obligation *erga omnes partes*	All States parties	Applies to legal regimes involving the public interest of all States parties, including in particular integral obligations (cf. article 40 (2) (e) (ii), (iii); (f))
Multilateral obligation generally	Unless otherwise provided, any State "specially affected by the breach" or regarded as having a "special interest"	Applies to all obligations which are multilateral in provenance and to which a specially affected State is a party; does not apply in legal contexts (e.g., diplomatic protection) recognized as pertaining specifically to the relations of two States *inter se*

(b) Permissible responses by "injured States"

108. It will be clear from the foregoing discussion that there is a distinction between the primary victim of the breach of a multilateral obligation and other States, party to the obligation, which may have a legal interest in its performance. It is true that in some cases of multilateral obligations there may be no particular obligee or beneficiary. This is probably true, for example, for the obligations of States parties not to omit excess CFCs into the atmosphere.[200] This is a purely solidary obligation, and there will never be a demonstrable connection with any particular breach and the impact on any particular State party. But there are other multilateral obligations where there is, clearly, a primary obligee. For example, self-determination is in the first place a right of the people in question. But it is an obligation *erga omnes* of States, in particular of those States responsible for the administration of Non-Self-Governing Territories.[201] The obligation not to use force against the territorial integrity or political independence of another State is an obligation *erga omnes*, but the particular victim is the State against which the armed

[198] As Switzerland observes: see above, para. 80.

[199] See below, para. 115.

[200] See the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, (1987) 26 ILM 1529; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, (1987) 26 ILM 1550.

[201] As the International Court affirmed in the *Case concerning East Timor, I.C.J. Reports, 1995*, p. 90, at p. 102 (para. 29).

force is used. Other examples could be given, of cases where the primary obligee is a State as well as where it is not.

109. Where one State is a particular victim of a breach, the position of "interested" States must be to some extent ancillary or secondary. For example, if that State validly consents to conduct that would otherwise constitute a breach of a multilateral obligation, that consent precludes wrongfulness.[202] Other States have a legal interest in compliance, and as a consequence they will have a legitimate concern to ensure that consent was validly given (e.g., without coercion or other vitiating factors). But their own consent would not preclude wrongfulness, any more than the consent of Ethiopia and Liberia could have precluded the wrongfulness of South Africa's conduct vis-à-vis the people of the mandated Territory. Similarly in the *Nicaragua case (Merits)*, the International Court noted that action by way of collective self-defence could not be taken by a third State except at the request of the victim (the State subjected to the armed attack).[203] Yet the rules relating to the use of force give rise to obligations *erga omnes*. This suggests the need to distinguish between a particular State which is the victim of the breach of a multilateral obligation and those States, not themselves victims, which have a legal interest in compliance with the obligation because it is owed to them as well. The latter group will not have the same rights as the former, and the simple equation of the two in the present version of article 40 is unsatisfactory.

110. Thus, in addition to distinguishing between the States entitled to rely on or invoke a multilateral responsibility, it may be necessary to differentiate between the different forms of action that can be taken by individual States which share with others a legal interest in compliance. Just because there is a common group of States legally entitled to invoke responsibility, the forms in which individual States can do so may have to be differentiated, and the question is how this is to be achieved. If they are not differentiated, the possibility will arise, for example, of one injured State electing to receive compensation in lieu of restitution while another insists on restitution; or of a third State insisting on taking countermeasures which the primary victim of the breach wishes to avoid for fear of aggravating the conflict or preventing a negotiated settlement. Many Governments commented on the potential for confusion and conflict which a purely individual and parallel system of invoking responsibility could produce.[204]

111. It is helpful to take the groups of States which could be classified as "legally interested" or "injured" in accordance with table 1. It is suggested that the State which is a victim of the breach of the multilateral obligation ought to be able to seek both cessation and reparation in all aspects, and should be able to take proportionate countermeasures if these are denied. That State ought also to be entitled validly to elect to receive compensation rather than restitution in kind, for example, in cases where the breach has made future performance of no value to it. In effect its position is assimilated to that of the injured State in a bilateral context (the State holder of a subjective right) so far as the invocation of responsibility is concerned. By analogy with article 60 (2) of the Vienna Convention, "specially affected" States should also be treated in this way: their own position will have been particularly affected by the

[202] See article 29; Second Report, A/CN.4/498/Add.2, paras. 230-241.
[203] *I.C.J. Reports, 1986*, p. 14, at p. 105 (para. 199).
[204] See above, paras. 77-80.

breach of an international obligation, and to that extent it is reasonable to extend to them the same range of rights in regard to cessation and reparation.[205]

112. In most cases there will only be one or a few States that are specifically injured in this sense, and questions of coordination between them are accordingly less difficult than they are when a large group of States, or all States, are deemed to be injured. It is suggested that no legal requirement of coordination or joint action should be imposed, any more than it is imposed on States specially affected, or States beneficiaries of an integral obligation, under article 60 (2) of the Vienna Convention. Coordination of response may be desirable, but since each State is by definition affected in terms of its own legal and factual situation, it ought to be free to that extent to respond to the breach.

113. The position of the broader class of States legally interested in a breach of an obligation *erga omnes* or *erga omnes partes* raises somewhat different considerations. In the first place, there seems to be no difficulty or possibility of conflict in recognizing to all such States the right to protest at an internationally wrongful act and to call for its cessation, if it is continuing. These are, as it were, the minimum consequences of internationally wrongful conduct. In addition, it seems appropriate that all such States should be able to insist on restitution, assuming that restitution is possible and that it has not been validly waived by the State which is the primary victim of the wrongful act. On the other hand, it is not clear that those States, merely because they are recognized as having a legal interest in the performance of the obligation, should be able to seek compensation or take countermeasures on their own account.[206]

114. In particular, both the analogy of article 60 (2) and the analogy of collective self-defence suggest the need for some regime of "collective countermeasures" in cases where States are acting in some collective interest rather than on account of any particular injury to themselves. Under article 60 (2), States which are not specially affected by a breach of a multilateral treaty (not involving an integral obligation) cannot individually take action to suspend or terminate the treaty; they can only do so collectively. It will be a matter for consideration in relation to Part Two *bis*, to what extent States may take countermeasures in the collective interest. To the extent that they may do so, the principle of proportionality should presumably apply collectively to the action taken by all of them. In cases where a State is the primary obligee (and in conformity with the Court's approach to collective self-defence in *Nicaragua*), countermeasures could only be taken at the request of that State. This may be contrasted with the existing provisions of Part Two, which allow each individual State to take countermeasures in the collective interest without regard to the position of the victim, of any other "injured State" or of the cumulative effect of such countermeasures on the target State. It may be that, in case of a breach of a multilateral obligation where there is no specially affected State, all other States parties will be able to call for cessation and for restitution, but that further collective measures would require the authorization of a competent

[205] The two States are not in all respects in the same legal position. An injured State in a bilateral context can waive the breach entirely, and may well be entitled to terminate the underlying legal relations; a "specially affected" State may not be able to do so, even though it can waive the consequences of the breach so far as it is concerned.

[206] In *The Wimbledon* (a case of an obligation *erga omnes partes*), France sought reparation in respect of its own losses, whereas the three other States were concerned to establish the principle in dispute (i.e., their primary concern was cessation): *P.C.I.J.*, Series A. No. 1 (1923).

international organization, or would have to be agreed between the States concerned.[207] But whatever solutions may be adopted in the framework of Part Two *bis*, it seems clear that the first step is to distinguish between the different groups of injured and interested States. The proposed reconsideration of article 40 will not answer all the questions raised by Part Two. But at least it should allow the right questions to be asked.

115. If article 40 is reconsidered along these lines, a further question will arise. This is whether the changes outlined here sufficiently respond to those cases where all States in the world are faced with the egregious breach of certain fundamental obligations (e.g., genocide or aggression). One problem, which article 19 clearly did not resolve, is that the seriousness of the breach of an obligation does not necessarily equate with the fundamental character of the obligation itself. There can, for example, be isolated acts of torture which do not warrant exceptional treatment, whereas it is difficult to conceive of a minor case of genocide.[208] There seems to be a good case for allowing countermeasures to be taken in response to egregious breaches of multilateral obligations, without imposing the requirement of unanimity among the "injured States". Otherwise, the more universal the obligation breached (e.g., at the level of an obligation *erga omnes*), the more difficult it would be to meet the requirements for countermeasures, since there would be a larger number of States whose agreement to those measures would be required. Exactly where the threshold should be set for countermeasures to be taken by individual States, acting not in their own but in the collective interest, is a difficult question. There is an issue of "due process" so far as concerns the target State, since at the time collective countermeasures are taken, its responsibility for the breach may be merely asserted, not demonstrated, and issues of fact and possible justifications are likely to have been raised and left unresolved. Some formula such as a "gross and reliably attested breach" is called for.

116. When the Commission first began to explore the notion of "injured State", the Special Rapporteur, Mr. Riphagen, commented that "the more serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach".[209] Since then, there has been some additional practice and some relevant case law, but the legal materials are still sparse. Nonetheless, table 2 below is suggested as a defensible scheme. If adopted in some form, it would allow the draft articles to reflect fundamental common concerns of States (especially breaches of obligations *erga omnes* of a peremptory character), while avoiding the undue licensing of individual responses to breaches by third States.

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[207] Questions as to the permissible extent of countermeasures are discussed further on in the present report.

[208] Apart from the prohibition of genocide, the prohibition of aggression is probably the only norm mentioned in article 19 (3) where every breach is, as it were, per se egregious. But the primary prohibition is that in Article 2, paragraph 4, of the Charter of the United Nations, which is not limited to aggression, and the definition of "aggression" remains unresolved. According to the General Assembly's definition, a judgement of the seriousness of the illegality has to be made in each case on an apparently ad hoc basis: see General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, article 2.

[209] Riphagen, Preliminary Report, *Yearbook ... 1980*, vol. II (Part One), pp. 128-129 (para. 97).

Table 2
Extent to which differently affected States may invoke the legal consequences of the responsibility of a State

	Bilateral obligations	*Multilateral obligations*[a]		
	Injured State	*"Specially affected" State*[b]	*Obligation* erga omnes partes[c]	*Obligation* erga omnes
Cessation (and assurances and guarantees)[d]	Yes	Yes	Yes	Yes
Restitution	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between the States parties
Compensation and satisfaction	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between the States parties
Countermeasures (under conditions in articles 47-50)	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between all States; but individually in case of well-attested gross breaches

[a] Note that the same State may be injured or affected in different ways by the same breach, the categories being cumulative: see above, para. 106.

[b] As explained in paragraph 106 above, this category includes: (a) States identified as the primary beneficiaries of the obligation or the primary victim of its breach (draft article 40 (2) (e) (i)); and (b) other States specially affected by a breach of a multilateral obligation to which they are party (Vienna Convention, article 60 (2) (b)).

[c] This includes the case where, as a matter of interpretation, a particular obligation is owed equally to all States parties. The cases covered by draft article 40 (2) (e) (iii) and (f) are examples.

[d] This includes, as a minimum, the right to a declaration by a competent court or tribunal in respect of the breach.

Issues of drafting and placement

117. In the first instance the Special Rapporteur seeks the guidance of the Commission on the proposed reconsideration of article 40, at the level of principle. The issues are evidently fundamental to the whole of Parts Two and Two *bis*. However, to assist in the discussion of the issues of principle, a draft article in lieu of existing article 40 is proposed below (without prejudice to its eventual location in the text). That proposal establishes the categories referred to in table 1, but does not

deal with the consequences of those categories, which will be a matter for chapters II and III and for Part Two *bis*.

118. Two questions arise at this stage:

(a) **A unitary concept of "injured State"**? The first is whether the draft articles should at least formally retain a unitary concept of "injured State", covering all the categories of injury and legal interest referred to in tables 1 and 2, or whether they should distinguish between "injured States" and States with a legal interest which are not themselves specifically affected by the breach. For the purposes of the discussion, the distinction is reflected in the language of the proposed article 40 *bis*;

(b) **Location of proposed article**. The second question is whether that article belongs in chapter I of Part Two or elsewhere. This depends on whether it is possible and desirable to express the secondary obligations, specified in more detail in later articles of Part Two, without reference to the concept of "injured State". It has already been concluded that the basic principles of cessation and reparation which are now to be stated in chapter I, should be expressed in terms of the obligations of the responsible State. In the Special Rapporteur's view, it would be desirable to express the remaining articles in Part Two in the same way, in effect as forms which the basic obligation of reparation may take depending on the circumstances. This would allow the proposed article to be located in Part Two *bis* as the key aspect of the invocation of responsibility. Indeed its location there might be thought to be implicit in the recognition that different States are differently affected or concerned, from a legal point of view, by the breach of an international obligation, and that the range of permissible responses must likewise vary.

6. Conclusions as to Part Two, chapter I

119. For these reasons, chapter I of Part Two should be formulated as follows:

Part Two
Legal consequences of an internationally wrongful act of a State

Chapter I General Principles

Article 36
Content of international responsibility

The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of Part One entails legal consequences as set out in this Part.

Article 36 bis
Cessation

1. The legal consequences of an internationally wrongful act under these articles do not affect the continued duty of the State concerned to perform the international obligation.

2. The State which has committed an internationally wrongful act is under an obligation:

(a) where it is engaged in a continuing wrongful act, to cease that act forthwith;

(b) to offer appropriate assurances and guarantees of non-repetition.

Article 37 bis
Reparation

1. A State which has committed an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act.

2. Full reparation shall eliminate the consequences of the internationally wrongful act by way of restitution in kind, compensation and satisfaction, either singly or combination, in accordance with the provisions of the following articles.

[Article 38[210]
Other consequences of an internationally wrongful act

The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.]

Article 40 bis[211]
Right of a State to invoke the responsibility of another State

1. For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if:

(a) the obligation breached is owed to it individually; or

(b) the obligation in question is owed to the international community as a whole (*erga omnes*), or to a group of States of which it is one, and the breach of the obligation:

(i) specially affects that State; or

(ii) necessarily affects the enjoyment of its rights or the performance of its obligations.

2. In addition, for the purposes of these draft articles, a State has a legal interest in the performance of an international obligation to which it is a party if:

(a) the obligation is owed to the international community as a whole (*erga omnes*);

(b) the obligation is established for the protection of the collective interests of a group of States, including that State.

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[210] For the reasons stated in paragraph 65, the Special Rapporteur doubts the value of this provision; hence it is placed in square brackets.

[211] These formulations of injury and legal interest will need to be followed through in later articles in terms of the different secondary consequences of the responsibility of a State for an internationally wrongful act. This may best be done in a separate Part dealing with the right to invoke State responsibility, and the placement of article 40 *bis* is accordingly provisional.

3. This article is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue directly to any person or entity other than a State.